(1)

Supreme Court, U.S.
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No. 01 493 SEP 20 2001

In the

Supreme Court of the United States

FRANKLIN SEXTON,

Petitioner,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT, RAY O. SHACKLEFORD, as an individual and in his official capacity as District Fire Chief; AL GRAMS, as an individual and in his official capacity as District Fire Chief; SOUTHERN CALIFORNIA RISK MANAGEMENT ASSOCIATES, INC., a California Corporation and public entity insurance carrier,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the "public concern" threshold requirement of the *Pickering –Connick* balancing test for First Amendment protection of public employee speech or petition activity should not be applied to civil rights litigation in the absence of evidence that the speech or petition activity resulted in disruption to the workplace?

II. Whether the Third Circuit rule excluding the "public concern" threshold requirement of the *Pickering – Connick* balancing test for First Amendment protection of public employee petitions should be applied in modified form to petition activity in civil rights litigation?

III. Whether the Supreme Court decision in *Albright v. Oliver* left open the question of whether and under what circumstances malicious prosecution or abuse of process claims may be maintained from an underlying civil action as substantive due process violations under 42 U.S.C. § 1983?

IV. Whether malicious prosecution and abuse of process claims from underlying civil actions should be actionable as substantive due process violations under 42 U.S.C. § 1983 based on common law tort elements with proof of intentional conduct?

PARTIES TO THE PROCEEDING

Petitioner-Plaintiff: Franklin Sexton
Respondents-Defendants: Chino Valley Independent Fire District; Ray O. Shackleford, as an individual and in his official capacity as District Fire Chief; Al Grams, as an individual and in his official capacity as District Fire Chief; and Southern California Risk Management Associates, Inc., a California Corporation and public entity insurance carrier.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frank Sexton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported and is reproduced in Appendix A at pages 1a - 4a. The following orders of the United States District Court for the Central District of California (No.: SACV-90-616-GLT (RWRx)) ("Sexton I") are not reported and are reproduced in the Appendix at the pages indicated: (1) Order Clarifying Summary Adjudication and Unified Judgement, App. B, pages 5a - 7a; and (2) Judgement on Offer and Acceptance, App. C, pages 8a - 10a. The Order Dismissing Cases of the State of California Workers' Compensation Appeals Board (Nos.: SBR 0258390 / SBR 0258393) is not reported and is reproduced in Appendix D at pages 11a - 12a.

The following orders and judgment of the United States District Court for the Central District of California (No.: SA-CV-95-534-GLT) ("Sexton II") are not reported and are reproduced in the Appendix as indicated: (1) Order Granting in Part Defendants' Motion For Summary Adjudication, App. E at pages 13a - 21a; (2) Order Granting Defendants' Motion for Summary Judgment, App. F at pages 22a - 29a; (3) Order Granting in Part Defendant's Motion for Summary Adjudication On Plaintiff's § 1985(2) Claim, App. G at pages 30a - 32a; (4) Order Granting Defendant's Motion for Summary Judgment, App. H at pages 33a - 37a; and (5) Judgment, App. I at pages 38a - 39a.

The Order denying Petition for Rehearing and for Rehearing En Banc of the United States Court of Appeals for the Ninth Circuit is not reported and is reproduced in Appendix J at page 40a.

JURISDICTION

The Court of Appeals entered its judgment on March 27, 2001, and denied Petitioner's Petition for Rehearing and for Rehearing En Banc on June 22, 2001. This petition for writ of certiorari is timely filed in accordance with Rules 13.1 and 13.3 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I, at page 45a.
Constitution of the United States, Amendment XIV, Section 1, at page 45a.
42 U.S.C. § 1983, at pages 45a-46a.
42 U.S.C. § 1985(2), at page 46a.
42 U.S.C. § 1985(3), at pages 46a-47a.
California Labor Code § 4850, at pages 47a-50a.
California Labor Code§ 4850.3, at pages 50a-51a.

STATEMENT OF THE CASE

Petitioner Franklin Sexton filed a federal civil rights action in 1990 against his employer Chino Rural Fire Protection District [CRFPD], County of San Bernardino [County], State of California, which resulted in judgment in favor of Sexton under the Due Process Clause when he was demoted from the rank of fire captain. [Sexton I] [App. C, at 8a-9a]. Sexton I turned on interpretation of County ordinances which prescribed when a temporary appointment created a property interest, as the parties had stipulated that Sexton had been demoted without any process. [App. B, at 6a].

During the pendency of Sexton I, on December 1, 1990, CRFPD was dissolved under a State procedure in which it became Chino Valley Independent Fire District [CVIFD], retaining employees at the rank then held, including Sexton. The litigation continued against the County.

During Sexton's annual cardiac examination January 31, 1991 he showed a heart arrythmia [PVC's]. Though not ill or disabled, he was placed on paid leave until April 29, 1991 while he was subjected to cardiac examinations by both his own health provider's cardiologist and by a cardiologist selected by CVIFD, Dr. Richard Hyman. Both agreed [in a written report from Dr. Hyman] that Sexton had cardio-vascular disease; that the extra heartbeats are benign in nature and uniformly recognized as not disabling nor require any work restriction and on April 29, 1991. Sexton was medically released to return to work without restriction.

Plaintiff refused to file any State worker's compensation [WCAB] claim, instead contending in Sexton I that emotional stresses associated with his unlawful demotion and related

events was a causal and/or aggravating factor in the condition[1]. CVIFD did not initiate any WCAB proceedings.

Sexton resumed normal duties as firefighter and paramedic, without restriction, and in 1992 was promoted to fire engineer. From April 29, 1991 until March 22, 1994, no issue was raised in CVIFD re Sexton's health and he did not miss work nor claim illness based on it.

During this period, CVIFD Fire Chief Ray Shackelford repeatedly and explicitly warned Sexton that he would prosper in CVIFD only if he kept it out of the lawsuit.

On March 22, 1994, Sexton's heart arrythmias were again noted, and he was placed on paid leave. Sexton submitted to a cardiac examination by a CVIFD selected expert, Dr. Alvin Markovitz, represented to Sexton as a "cardiologist" though he was merely an internist specializing as WCAB employer-hired forensic expert. Sexton provided him with his prior medical records from treating cardiologists [Mendiones and Dasgupta] and the prior CVIFD-selected cardiologist, Dr. Hyman.

Sexton again declined to file any WCAB claim. On March 25, 1994, CVIFD placed Sexton on earned sick leave status – payment of his base salary – which Sexton grieved via his union on the grounds that he was not ill nor disabled[2]. On April 4, 1994, Sexton's status was altered to paid administrative leave, which still meant receipt of his base salary.

On April 13, 1994, Dr. Markovitz, noting the conclusions of all prior cardiologists, reported the identical conclusions, and that in light of the absence of heart disease, the PVC's are benign and not disabling. Dr. Markovitz rejected the concern that Plaintiff might have dizziness or pass out.

On April 22, 1994, Sexton's attorney in Sexton I faxed a letter offering settlement, at which time the County brought CVIFD into those proceedings, demanding that it participate in any payment to Plaintiff because CVIFD, upon its formation

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[1] Sexton did not wish to receive WCAB benefits nor adjudicate factual issues in that forum, as he was seeking remedies through Sexton I, and wished to avoid an estoppel problem under *Sanchez v. City of Santa Ana,* 915 F.2d 424 (9th Cir. 1991), *cert. denied,* 502 U.S.815 (1991).

[2] Sexton's privately maintained grievances and requests for due process, made in response to every attempt to medically retire him, were largely ignored or delayed over the next two years.

effective December 1, 1990, had assumed liability for all its predecessor's debts.

On May 10, 1994, Southern California Risk Management Association [SCRMA] – a contract private agency handling WCAB matters for CVIFD – wrote to Sexton that in light of Dr. Markovitz' conclusions, Sexton had no organic heart disease, and Sexton was returned to regular duty as a fire engineer and worked without incident through June 3, 1994.

On May 11, 1994, Dr. Markovitz – without any additional examination of Sexton, but in response to further writings from CVIFD which later disappeared – reversed field and declared that Sexton was disabled, without explaining the change. On June 3, 1994, Sexton was again placed on involuntary paid leave under *California Labor Code* sec.4850, a statutory provision for firefighters to receive full base salary for up to first year of any work-related disability, and he received this "4850 pay" until November 25, 1994. He continued to accept it, but expressly insisted that he was neither disabled nor seeking WCAB benefits, and, because he was at all times ready to resume full duties, was entitled to his base salary until deprived in accordance with due process of law[3].

On July 19, 1994, in Sexton I the District Court found that Sexton had had a property interest in his position as captain when he was demoted without any process; and judgment against the County and two (2) individual defendants was entered September 12, 1994. [App. B, 5a-6a]. Remedies, including stress claims related to his benign PVC's or any disability, were deferred to another date.

On October 19, 1994, Dr. Kirschbaum – a cardiac expert in Sexton I – issued his report that Sexton can return to his usual and customary work as a fire engineer, on the same reasoning as that of cardiologists Dasgupta, Mendiones and Hyman, and, initially, Markovitz. Defense counsel in Sexton I informed Sexton's counsel that CVIFD had importuned Dr. Markovitz to change his report.

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[3] Throughout this period, Sexton continued to work – with permission from CVIFD – at a second job which he had been working at for years, as a 911 emergency call dispatcher for the Ontario Police Department.

Reports from Dr. Kirschbaum were received November 15, 1994 and provided to CVIFD and SCRMA, and again confirmed by treating cardiologist Dr. Dasgupta. On December 20, 1994, based on the Kirschbaum report, CVIFD converted Sexton's status to paid administrative leave instead of 4850 disability pay, retroactive to November 26, 1994, and ordered him to return to work in a makeshift administrative capacity on January 22, 1995, on grounds that Sexton had failed to apply for WCAB benefits. On January 3, 1995, Sexton wrote to Fire Chief Grams and CVIFD and objected to the limited duty assignment which effectively reduced his pay – denying him the regular overtime hours which regular firefighters earned because of their 72-hour shifts – and relegated him to clerical duties not normally performed by a fire engineer; and requested due process of law.

On January 18, 1995, Chief Grams wrote to Sexton, refusing to afford any due process and stated that the decisions were made by SCRMA not CVIFD, and that these decisions were based on the Kirschbaum report that Sexton was not disabled. On February 22, 1995, he commenced the makeshift administrative job that bore little resemblance to the assigned duties of a fire engineer, and which continued until September 30, 1995[4]. Sexton did not assert any of his objections in the workplace or while on duty, instead doing so only though his lawyers who communicated with lawyers for CVIFD and SCRMA.

On March 21, 1995, Sexton was given his normal annual physical examination which concluded that he continued to reflect no cardiac disease, had superior tolerance for exercise, and there were no known significant changes from studies done in years past. Sexton then secured an outside opinion from UCLA cardiac expert Dr. Isaac Weiner, whose report of June 7, 1995, later reported to CVIFD September 27, 1995 and to SCRMA by December 4, 1995, reached identical conclusions as Hyman and Dasgupta and other cardiologists had reached.

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[4] On June 22, 1995, CVIFD denied that Sexton was "on an administrative assignment" despite the earlier memorandum by Chief Grams that Sexton was "directed to report to an administrative duty assignment at Fire District Headquarters" and which previously nonexistent administrative assignment he was performing.

The action that is the subject of this Petition was filed by Sexton on June 4, 1995 [Sexton II]. Sexton alleged that the actions of defendants were in retaliation for Sexton having involved CVIFD in its Sexton I federal action against the predecessor fire district of the County – as previously threatened by Fire Chief Shackelford – in violation of Sexton's rights under the First Amendment free speech and petition clauses and 42 U.S.C. sec.1983[5]. On June 24, 1995 actual notice was given to CVIFD that Sexton II had been filed[6].

On July 13, 1995, SCRMA and CVIFD notified Sexton's counsel that as soon as his current "administrative duties" were completed Plaintiff would be placed in an involuntary retirement status, and given "advance" pre-payment of 50% retirement pay while the forcible retirement petition would be pending, per *California Labor Code* sec.4850.3. On July 17 & 25, 1995, CVIFD and SCRMA filed petitions with WCAB[7] seeking benefits and forcible retirement for Plaintiff, and noting that Sexton had refused to complete or sign the WCAB claim forms. On July 24, 1995, Sexton was informed by SCRMA that CVIFD had no job for him beyond the temporary administrative assignment, and offered "vocational rehabilitation[8]." The WCAB petitions were served on Sexton July 31 and August 24, 1995.

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[5] In claims not pertinent to this petition, Sexton also alleged that he had been deprived of his rank and duties as a fire engineer without due process of law in violation of his rights under the Fourteenth Amendment and 42 U.S.C. sec.1983; that defendants had conspired to deter and penalize Sexton from seeking to vindicate his rights in a federal court in violation of his rights under 42 U.S.C. sec.1985(2); and seeking to enforce the judgment in Sexton I to secure restoration of Sexton's rank of captain.

[6] CVIFD and SCRMA defendants answered and filed a third party complaint against the County seeking indemnification; the County filed its answer and a cross-complaint against Sexton, also seeking indemnification.

[7] These WCAB petitions were executed months before Dr. Markovitz' July 12, 1995 "conclusion" that Sexton was "permanent and stationary" and not responding to treatment, and before the treatment itself – *i.e.* by SCRMA on December 6, 1994 and February 6, 1995, and by Chief Grams for CVIFD on February 22 & 25, 1995.

[8] On July 25, 1995, Sexton was informed by SCRMA that he would be receiving $140 per week for a total of $3,388 for personal injury under the WCAB system, $280 of which was enclosed. Sexton refused to convert these checks, or any payments other than his base salary.

At Sexton's request, his treating cardiologist Dr. Dasgupta – based on his own examinations and review of all reports of other cardiologists – issued a report on July 27, 1995 and again repeated that in the absence of organic heart disease, the PVC's are benign and that Sexton is "fully able to perform his job and should in no way be denied his right of full occupation at his chosen profession."

On September 25, 1995, Sexton's retained counsel filed formal opposition to the WCAB petitions, contending that Markovitz was not a treating physician, rendering Markovitz' opinions legally insufficient. On September 27, 1995, Sexton served on CVIFD Board of Directors and Chief Grams the latest report of Dr. Dasgupta and demanded that CVIFD desist from its intent to put him immediately on involuntary retirement status at 50% pay.

On September 30, 1995, Sexton was told that his administrative assignment had ended and was ordered off work. Sexton was not then informed of his pay status, but he continued to receive his regular base rate of pay, as he had continuously since March 22, 1994 regardless of the pay status selected by CVIFD. On January 5, 1996, Sexton received a belated written notice from CVIFD that his pay since June 4, 1995 was retroactively deemed 4850 pay. On April 4, 1996, CVIFD ceased paying Sexton's salary.

On March 8, 1996, in a deposition of Dr. Markovitz by Sexton's WCAB counsel, Markovitz reviewed the cardiologist report and then declined to reassert any opinion that Sexton was then or had ever been disabled due to the cardiac arrhythmias or PVC's. On May 9, 1996, at the direction of CVIFD and SCRMA, Sexton reported to cardiologist Dr. Frank R. Villalobos, who also reviewed all of Sexton's medical and psychological records, and on May 23, 1996, Dr. Villalobos noted the unanimous views of seven (7) cardiologists who had examined Sexton since 1991, and concurred with them that Sexton's PVC's are benign and that he is not disabled.

On May 10, 1996, the defendants in Sexton I made an offer of judgment in the amount of $250,000. [App. C, at 9a]. Sexton accepted the offer of judgment in Sexton I, and the previously filed judgment of September 12, 1994, as modified, also remained in full force and effect. [App. C, at 8a-10a].

On August 22, 1996, Sexton was finally permitted to return to his normal fire engineer duties, without restriction, and since then Sexton has performed his regular fire engineer duties without any medical or other problems, as he had done previously in 1991 - 1994. The two WCAB actions were then dismissed April 23, 1997 on motion of Sexton's WCAB attorney. [App. D, at 11a].

On February 10, 1997, a Fourth Amended and Supplemental Complaint was filed herein, adding additional claims for malicious prosecution and abuse of process, in connection with the unsuccessful WCAB petitions prosecuted by CVIFD and SCRMA against Sexton, seeking to have him adjudicated as permanently disabled as a prelude to involuntary retirement; and supplementing the retaliation claims to include Sexton II as targeted protected speech / petition activity.

Sexton II was adjudicated in favor of defendants in four Motions for Summary Adjudication[9]. Sexton's First Amendment and statutory claims under sec.1983 and sec.1985(2) were rejected on the basis that his speech and petition activity – his litigations in Sexton I and Sexton II – were not matters of public concern. [App. F, at 22a-27a; App. G, at 30a-33a]. Sexton's malicious prosecution and abuse of process claims were rejected because, under the Ninth Circuit rule that such claims can only be maintained if there is also proof of an intent to do so to deprive some other constitutional right; and because plaintiff could not demonstrate such intent under the First Amendment because the speech / petition activity was not a matter of public concern. [App. F, at 28a-29a; App. H, at 34a-40a].

On timely appeal to the Ninth Circuit Court of Appeal, the judgment of the District Court was affirmed March 27, 2001 in an unpublished opinion [App. A, at 1a-4a] and timely petitions for rehearing and rehearing *en banc* were denied June 22, 2001 [App. J, at 43a-44a]. In respect to Sexton's First Amendment retaliation, malicious prosecution and abuse of

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[9] Sexton's due process claims were rejected primarily on grounds that Sexton did not in the end lose any property or liberty interest and rejected a substantive due process theory for the damages incurred in the failed attempt to deprive him of his employment and career. [App E, at 16a-19a; App. F, at 27a-28a].

process claims, the Ninth Circuit affirmed the reasoning of the District Court[10]:

> "1. The district court properly granted summary judgment on Sexton's claim under 42 U.S.C. § 1983 that the Defendants intended to deprive Sexton of his First Amendment right to petition the government by retaliating against him for his prior assertion of claims. A public employee's litigation must involve a matter of public concern in order to be protected by the Petition Clause. *Rendish v. City of Tacoma,* 123 F3d 1216, 1220 (9th Cir. 1997). Sexton's prior litigation only involved his individual personnel disputes and grievances; it did not involve matters of public concern. Thus, his § 1983 claim is not legally viable. *Roe v. City & County of San Francisco,* 109 F.3d 578, 585 (9th Cir. 1997). Absent an underlying constitutional violation, Sexton's § 1983 claims for malicious prosecution and abuse of process also fail. *Albright v. Oliver,* 510 U.S. 266, 270-71 (1994)."

[App. A, at 2a].

REASONS TO GRANT THE WRIT OF CERTIORARI

I. THE NINTH CIRCUIT'S APPLICATION OF THE *PICKERING–CONNICK* TEST IN A PETITION CASE REGARDING FEDERAL CIVIL RIGHTS LITIGATION WITH NO EVIDENCE OF DISRUPTION OF THE WORKPLACE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW AND A CONFLICT AMONG THE CIRCUITS THAT HAVE NOT BEEN BUT SHOULD BE SETTLED BY THE SUPREME COURT

Sexton raises two (2) instances of protected speech and petition activity in claims based on First Amendment retaliation

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[10] Remaining parts of the judgment were affirmed on grounds that do not bear on this petition.

for filing successive federal civil rights litigations: (a) the successful pursuit of his due process claims in Sexton I, in connection with his demotion from rank of captain, for which defendants placed him on indefinite disability leave for a benign cardiac condition for which he had already been previously cleared for work, including by the employer's own cardiac expert; and (b) the filing of Sexton II, alleging *inter alia* that the wrongful disability leave decisions were in retaliation for Sexton I, for both of which defendants commenced – with malice and without probable cause – WCAB proceedings seeking to permanently and involuntarily retire Sexton based on an alleged cardiac condition which they knew to be benign and not disabling.

There was no assertion or showing by defendants at any point below that the speech and petition activity in either Sexton I or Sexton II ever caused or threatened to cause any disruption of the workplace, or any other diminution of the efficiency of the public service.

Instead, defendants claimed, the District Court found, and the Ninth Circuit affirmed, that the speech and petition activity in Sexton I and Sexton II did not involve matters of public concern, notwithstanding federal constitutional grounds asserted in each; that such a showing was required to maintain claims under the speech or petition clauses of the First Amendment; and based thereon granted summary judgment on all claims based in whole or in part on First Amendment retaliation. *Rendish v. City of Tacoma,* 123 F.3d 1216, 1225 (9th Cir. 1997) was applied by the District Court to hold that litigation-based claims under the First Amendment's Petition Clause, by a public employee, must meet the "matter of public concern" requirement for First Amendment protection[11].

A.THE "PUBLIC CONCERN" THRESHOLD REQUIREMENT OF THE *PICKERING – CONNICK* BALANCING TEST FOR FIRST AMENDMENT PROTECTION OF PUBLIC EMPLOYEE SPEECH OR PETITIONS SHOULD NOT BE APPLIED TO CIVIL

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[11] *Rendish* was reaffirmed in *Brewster v. The Board of Education of the Lynwood Unified School District,* 149 F.3d 971 (9th Cir. 1998), *cert. denied,* 526 U.S. 1018 (1999); *Lytle v. Wondrash,* 182 F.3d 1083 (9th Cir. 1999).

RIGHTS LITIGATION IN THE ABSENCE OF EVIDENCE THAT THE SPEECH OR PETITION ACTIVITY RESULTED IN ANY DISRUPTION TO THE WORKPLACE

In *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968), this Court first set forth the standard for assessing the scope of public employee speech rights, noting that the government as employer has greater authority to restrict employee speech than it does as sovereign in respect to the general citizenry. The Court decreed a balancing test between an employee's speech interest and the government employer's interest in "promoting the efficiency of the public services it performs through its employees." *See id.,* 391 U.S. at 568. That balancing test was given an analytical framework in *Connick v. Myers,* 461 U.S. 138 (1983), holding that speech on matters of public concern cannot be penalized by public employers unless the speech interest is "outweighed by any injury the speech would cause to 'the interests of the State, as an employer, in promoting the efficiency of disruption to the public service.' *Connick,* 461 U.S. at 142 (quoting *Pickering*; internal quotes omitted)." *Waters v. Churchill,*511 U.S. 661, 668 (1993).

Conversely, *Connick* added that it did not mean to suggest that public employee speech on personal or private matters were not subject to normal First Amendment protection; rather, regarding employee speech on "matters only of personal interest, *absent the most unusual circumstances,* a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency."*See id.,* 461 U.S. at 147 (emphasis added); *Rankin v. McPherson,* 483 U.S. 378, 384 n.7 (1987).

While this Court has suggested that it has "refrained from intervening in government employer decisions that are based on speech that is of entirely private concern [although d]oubtless some such speech is sometimes nondisruptive," *Waters,* 511 U.S. at 674, it has never addressed a case in which speech was both entirely not of public concern and nondisruptive. Neither *Connick* nor *Waters* involved such a combination, nor cited a case which did. Only once has this Court found that an employer "fail[ed] to demonstrate a state interest that outweigh's [the employee]'s First Amendment

rights" – while still finding that the speech was of public concern. *See Rankin,* 483 U.S. at 388-89.

Without even addressing the *Pickering–Connick* test, however, this Court has held in a series of rulings that a public employer may not terminate nor make any other adverse personnel decisions based on the political party identification of or electoral positions taken by public employees not in policy-making positions, recognizing the unique importance of the democratic political process, and finding that there were less restrictive means to effect any government interests. *See Rutan v. Republican Party of Illinois,* 497 U.S. 62, 68-70, 74-76 (1990); *Branti v. Finkel,* 445 U.S. 507, 516-18 & n.5 (1980); *Elrod v. Burns,* 427 U.S. 347, 351, 356, 365-67, 372-73 (1976) (plurality)[12].

Moreover, while the Court has declared that the public employer's perceptions of what constitutes disruption or other diminution of that efficiency of the public service is entitled to great deference and latitude, *see Waters,* 511 U.S. at 673, it nevertheless imposed an objective standard of reasonableness on those factual assessments, and an objectively reasonable duty of care in doing so, *see id.,* 511 U.S. at 677-78. An assertion of such disruption which is not in good faith or is a mere pretext will not be accommodated. *See id.,* 51 U.S. at 677.

This Court could thus fashion a rule which only subjects speech which would normally be within the ambit of First Amendment protections to the *Pickering–Connick* when and only if there is some basis for assessing whether there was any issue of disruption of the workplace or other diminution of the efficiency of public service. It would then only need to develop some standard for assessing whether this analysis is required at all.

This Court has fashioned a rule in the equal protection / discrimination fields which would be adaptable in this context. When a court seeks to determine whether there is circumstantial evidence of unlawful discrimination, there is a point in the

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[12] Not mentioned, is that the speech-related activity involved in each case did not occur in the workplace and was off-duty, where the potential for workplace disruption would seem to be less likely or substantial. If the speech activity involved workplace party or electoral activity, then the *Pickering–Connick* analysis would govern.

analytical framework in which the employer – to avoid a finding of discrimination – must articulate a legitimate nondiscriminatory employment reason for its actions; after which, in order to prevail, the employee has the burden and opportunity to show that the articulated reason is pretextual or otherwise unlawful. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-56 (1981).

In this setting, the burden of proof remains at all times with the employee, but the employer's burden of articulation is a burden of production under which it must "clearly set forth, through the introduction of admissible evidence, [its] reasons . . . [which] must be legally sufficient to justify a judgment for the defendant." *See id.,* 450 U.S. at 255-56. Then, the employee has the opportunity to respond by showing that the proffered reason is pretextual by evidence that a "discriminatory reason more likely motivated the employer or by showing that the employer's proffered explanation is unworthy of credence." *See id.,* 450 U.S. at 256.

This sequential analysis resembles in some respects the procedural aspects of the burdens imposed on the employer in *Waters* and can be readily adapted to First Amendment cases. Once a plaintiff establishes that he engaged in some form of speech activity which would normally be subject to constitutional protection under the First Amendment – with whatever other limitations which the Court may wish to impose – the burden can shift to the employer to articulate, under the same standards established in *Burdine*, its nonpretextual assertion [per *Waters*] of its claim that there was some disruption or other diminution of the efficiency of public service caused by the speech. Failing that, there is no reason to determine whether speech involved is a matter of public concern.

The broader question posed is whether the government as public employer has any legitimate interest at all in restricting, dissuading or penalizing any form of nondisruptive speech which in any non-employment context is clearly within the ambit of First Amendment protection. Given this Court's caveats in *Connick–Rankin* regarding potential First Amendment protections for public employee speech of a private nature, the ban in *Rutan–Branti–Elrod* on political patronage in

personnel decisions of all types, and the reasonableness standards imposed in *Waters* on public employer assessments of workplace disruption in assessing whether public employee speech is protected, there is no rational reason not to afford public employees protection from employer retaliation for purely personal nondisruptive speech.

Even if this Court is not disposed to contemplate a broad ban on public employer retaliation for nondisruptive personal or private speech that is not of public concern, it would appear that mere litigation in the courts – especially the federal courts – of federal constitutional or civil rights claims which the employee pursues while off-duty and does not personally bring it into the workplace via other forms of speech would be the type of "unusual circumstance" referenced in *Connick–Rankin.*

This Court has repeatedly referred to access to the courts and judicial system as being one of the fundamental constitutional liberties deserving of solicitous protections by the courts. *See e.g. Lewis v. Arizona Department of Corrections,* 518 U.S. 343, 354 (1996) (prisoner access); *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974) (same; comparing Civil Rights Act of 1871 – including 42 U.S.C. § 1983 – to the Great Writ); *Bill Johnson's Restaurants v. National Labor Relations Board,* 461 U.S. 731, 741-45 (1983) (unfair labor practice under NLRB to terminate employee for civil action against employer unless filed as "mere sham" for harassment purposes); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972) (same in anti-trust setting)[13]. This is not unlike the Court's basis for carving a special rule barring patronage decisions by public employers for nonpolicy-making employees, where the Court explained that "'[p]olitical belief and association constitute the core of those activities protected by

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[13] The First Amendment interests being secured in private litigation were described as "compensation for violated rights, the psychological benefits of vindication [and] public airing of disputed facts." *See Bill Johnson's Restaurants,* 461 U.S. at 743. This Court also noted that without the protections it was affording to the right of access to the courts, to prevent employers from effectively preventing even meritorious litigations, "it necessarily follows that any . . . plaintiff . . . will be totally deprived of a remedy for an actual injury." *Id.,* 461 U.S. at 742.

the First Amendment.'" *See Rutan,* 497 U.S. at 63; *Elrod,* 427 U.S. at 356.

This First Amendment based analysis that effectively affords protection to access to the courts for employees of private employers, if applied to the public sector would avoid two key problems cited in *Connick*: (a) that the federal courts are not proper forums for appeals from every disputed public employment personnel decision, just because it is crafted into some form of grievance or verbal complaint, *see Connick,* 461 U.S. at 147-49; and (b) public employees should not have constitutional protections for their personnel grievances which are not normally subject to any form of judicial review in the private workplace. *See id.,* 461 U.S. at 147. Litigation that is not a mere sham has a much more vital role in the nation's scheme of protected political freedoms than day-to-day interactions in the workplace, and the fact that it may involve persons or events from a workplace does not vitiate the larger constitutional significance of the conduct.

The Court could narrow the "unusual circumstance" exception by limiting it to litigation seeking to vindicate federal constitutional or other civil rights – whose exalted importance in the nation's system of liberty and democracy the courts have repeatedly cited. *See e.g. Wolf,* 418 U.S. at 579. This Court has often recognized the role which litigation of constitutional and civil rights claims serves as a "'form of political expression' and 'political association'" and, in development and advancement of the law in such areas. *See e.g. In re Primus,* 436 U.S. 412, 431-33 (1978) (and cases cited therein); *NAACP v. Button,* 371 U.S. 415, 429, 431 n.20 (1963). Congress too has expressly recognized the important role of the federal courts in vindicating individual enforcement of constitutional and civil rights claims by its adoption, as part of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2) (remedies for conspiracies to deter or penalize access to the federal courts). *See Kush v. Rutledge,* 460 U.S. 719, 720 (1983) (proof of invidious class-based discriminatory intent not required as in parallel provision for state courts in §1985(3)).

An ancillary question arises when an employee asserts a claim for deprivation of constitutional or civil rights: At what point do such assertions implicate matters of public concern?

Under *Connick*, speech is a matter of public concern unless it is "upon matters *only* of personal interest" and "cannot be fairly considered as relating to *any* matter of political, social or other concern to the community." *See Connick*, 461 U.S. 146-47. This Court has held that a complaint of discrimination made privately within the employment context constitutes protected speech. *See Givhan v. Western Line Cons. School Dist.*, 439 U.S. 410, 412-15 (1979).

In the instant case, Sexton embarked on the matters now before the Court when he first initiated a federal civil rights claim [Sexton I] in federal court – ultimately successful – seeking interpretation of his then employer's personnel regulations to determine whether his demotion from the rank of captain implicated a property interest which would require due process which the employer had denied based on its differing interpretation of the same regulation. Sexton's successor employer warned Sexton that its personnel decisions would turn on whether it became embroiled in the litigation, and when it did in April 1994, promptly moved to retire Sexton on medical grounds which its own cardiac expert – as well as Sexton's treating cardiologists – had rejected three (3) years earlier on the same medical evidence.

When defendants' own selected medical expert – a forensic internist – concurred with the cardiac experts, Sexton was returned to work until they succeeded in convincing the internist to reverse his diagnosis. When Sexton provided further cardiologist opinions that he was not disabled, defendants flip-flopped in assignments to paid disability leave, paid administrative leave, paid limited-duty make-shift administrative unpaid job, unpaid disability leave and paid sick leave. When, after a year of this, Sexton filed a further federal civil rights action, seeking remedies against efforts to forcibly retire him on spurious medical grounds [Sexton II], defendants immediately responded by filing baseless and frivolous petitions to the WCAB seeking a determination that he was in fact disabled, and permanent and stationary, the necessary predicates for involuntary medical retirement.

When defendants' forensic expert internist again reversed himself on his own opinion that Sexton was disabled, he was then sent to another employer cardiac expert, who then

confirmed the condition is benign and Sexton is not disabled. After three more months of further stalling, Sexton was restored to his full duties and defendants' WCAB petitions were dismissed.

There was no claim by the employer that Sexton's litigations in any way affected the workplace or its efficiency at all; nor that it affected Sexton's work performance. Nor did they contend that Sexton brought his litigations into the workplace itself. Sexton II was unsuccessful on the First Amendment and malicious prosecution claims solely because of the determination that neither Sexton I nor Sexton II involved matters of public concern[14].

This case is a four-square presentation of a factual record in which there truly is speech ostensibly personal but still going to the core of protected forms of speech, but in no way disruptive or posing any other type of risk or harm to the public service, such that it warrants permitting the employer to punish the speech in any way. Yet, under existing legal standards, the Ninth Circuit was able to conclude that there was no legal basis for a remedy from this injury

B.THE THIRD CIRCUIT RULE EXCLUDING THE "PUBLIC CONCERN" THRESHOLD REQUIREMENT OF THE *PICKERING – CONNICK* BALANCING TEST FOR FIRST AMENDMENT PROTECTION OF PUBLIC EMPLOYEE SPEECH SHOULD BE APPLIED IN MODIFIED FORM TO PETITION ACTIVITY IN CIVIL RIGHTS LITIGATION

Rendish, since affirmed by other Ninth Circuit panels, has stated the basic proposition that there is no practical distinction between the speech and petition clauses of the First Amendment, and that hence the *Connick* rule – that the threshold requirement for First Amendment claims of retaliation in public employment is proof that the speech concerned a matter of public concern – applies without distinction to claims under the petition clause. The Ninth Circuit has expressly rejected any exception for either state or federal litigation. *See Rendish,* 123 F.3d at 1225 (state court); *Brewster,* 149 F.3d at

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[14] Sexton failed on the other due process claims because he ultimately recovered his normal job.

974, 978 (state court); *Lytle,* 182 F.3d at 1085-1087 (federal court).

The Third Circuit has expressly rejected the rule adopted in *Rendish* and all other circuits which have addressed the issue – which the Third Circuit expressly acknowledges – holding that where the speech may be fairly characterized under the petition clause, it is not necessary to show that it addressed any matter of public concern. *See San Fillippo v. Bongionvanni,* 30 F.3d 424, 439-40 & n.19 (3rd Cir. 1994), *cert. denied,* 513 U.S. 1082 (1995) (filing lawsuits or submitting employer grievance protected under petition clause of First Amendment.). *Accord, Anderson v. Davila,* 125 F.3d 148 (3rd Cir. 1997). The Third Circuit declined to apply *Connick.*

The Third Circuit reasoned that, notwithstanding the language in *McDonald v. Smith,* 472 U.S. 479, 482 (1985) suggesting that there was no analytical distinction between the speech and petition clauses, the petition clause of the First Amendment was not intended to be a dead letter, a mere redundancy to the free speech clause; and that the facts presented in *McDonald* – whether the libel and malicious falsehood standards of the speech clause should extend to the petition clause when applied to a letter to the president – are clearly distinguishable from the issue presented regarding the scope of protected public employee speech[15]. *See San Fillippo,* 30 F.3d at 437-40.

The Third Circuit does not distinguish between petitions which are presented in the form of litigation and those which are addressed directly to the employer. In that sense, the rule adopted therein shares the same formalistic weaknesses which petitioner herein cites in Section I.A, *supra,* and as is inherent in the general rule adopted in *Rendish* and other circuits.

As is thoroughly discussed in *Connick, supra,* 461 U.S. at 146-49, highly disruptive internal speech activity, with little or no content which might be matters of public concern, can be

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[15] The Third Circuit added that the rule adopted in *Macdonald* is the same as has been applied in respect to whether to assure access to the courts as a fundamental First Amendment protection – which have always distinguished between viable legal actions and "mere sham" litigation, citing *Bill Johnson's Restaurants, supra,* 461 U.S. at 743 and *California Motor Transport Co., supra,* 404 U.S. at 510. *See San Fillippo,* 30 F.3d at 436.

easily characterized as "petition" activity as well as "speech" activity. Conversely, litigation can be purely personal, not even involving the constitutional and civil rights claims, and have virtually no reference or contact with the workplace, much less cause any disruption therein.

The constitutional protection of any form of speech or its content should not turn on the technical title assigned to the form of the speech. Nor should it be stripped of its constitutional protection simply because the speaker or petitioner happens to be an employee of the governmental entity which wishes to prevent or punish the litigation.

The preferable approach is to apply a functional analysis which focuses on the practical form of the speech in the context of its overall impact and relationship of the speaker–petitioner to the public employer – as urged by petitioner in Section I.A, *supra.* Thus, the touchstone is whether there is any realistic issue of any disruption or other diminution of the efficiency of the public service.

Rather than simply discard the "matter of public concern" threshold test for all speech cases denominated as "petition" cases, this Court could resolve this dispute by affording blanket constitutional protection, as in *Rutan–Branti–Elrod,* for civil litigation only, perhaps limiting it to federal litigation and/or actions seeking vindication of any constitutional or civil right, so long as the activity in issue remained exclusively involved in solely those activities connected with the litigation itself. Any other speech engaged in by the employee which serves to bring the legal actions into the workplace, and which are not intrinsically intertwined with the litigation activity itself, would be subject to the normal *Pickering–Connick* analysis.

The risk of "mere sham" litigation can be addressed by existing standards applied by this Court in *Bill Johnson's Restaurants, supra*, 461 U.S. at 743-45, in which this Court noted that frivolous or sham litigation – like libelous and other forms of false speech – are not protected by the First Amendment. The Court then applied a modification of the summary judgment standard – whether the claims present genuine issues of material fact or issues of law which the particular jurisdiction would need to address – to assess whether

the litigation has lost its constitutional protection as a "mere sham" legal action for purposes of harassment. *See id.*, 461 U.S. at 745-47.

Alternatively, the Court can simply hold that litigation activity, perhaps similarly delimited to those which involve efforts to vindicate constitutional or other civil rights, is protected speech subject to the same *Pickering–Connick–Waters* analysis as is now applied to speech which is established as a matter of public concern. In other words, the Court can remove the trial and appellate courts from the unseemly and highly risky process of trying to assess *ex post facto* – and expect employer litigants to assess *a priori* – which provisions of the constitution and civil rights enactments are matters of public concern and which are not.

The Third Circuit is correct in its assertion that, to treat the petition clause as for all purposes and circumstances as indistinguishable from the speech clause, is render the petition clause as merely a redundancy to the free speech clause. Indeed, the express reference to that type of speech suggests that the framers intended it to have special consideration and attention.

Moreover, the history of the petition clause and its predecessors in Anglo-American jurisprudence suggests that legal protections for petitions by the citizenry to the sovereign is a hallowed tradition whose demise would be sorely mourned someday. *See San Fillippo,* 30 F.3d at 4442-43 & nn. & 23. Whereas such petitions were once directed to the "king" as sovereign – who in those days prior to separation of powers and judicial independence also controlled the courts of equity – they now are as often as not submitted and acted upon through the independent judiciary.

The courts should be especially jealous to protect the freedom of the American people to resort to the courts without fear of unrelated penalties. Under the majority rule in force, public employers are permitted to retaliate against public employees for otherwise protected petitions to the courts even if there is no connection between the litigation and the employment, it is purely personal, and is of no interest to any member of the public or the employer except perhaps a supervisor who has a peculiar personal interest or concern in the litigation or perhaps a party.

There are no public policy reasons for making such a formalistic distinction which arbitrarily distinguishes between classes of people, whose sole distinction is whether they happen to be employed by a public agency. As reasoned in *Rutan–Branti–Elrod*, which involves similar core First Amendment values in the political–electoral arena which may or many not pose as much risk of disruption of the public workplace as do litigations, there are less drastic means of securing the public interests involved which do not entail wholesale sacrifice of the rights of public employees to access the courts for legitimate efforts to petition for redress of grievances.

II.THE NINTH CIRCUIT'S LIMITATION OF CLAIMS FOR MALICIOUS PROSECUTION AND ABUSE OF PROCESS UNDER 42 U.S.C. § 1983 TO THOSE CIVIL CASES IN WHICH THERE IS AN UNDERLYING INTENT TO DEPRIVE A CONSTITUTIONAL RIGHT INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW AND A CONFLICT AMONG THE CIRCUITS THAT HAVE NOT BEEN BUT SHOULD BE DECIDED BY THE SUPREME COURT

In *Albright v. Oliver,* 510 U.S. 266 (1994), a splintered Supreme Court sought to address malicious prosecution claims under 42 U.S.C. § 1983, but agreed on rejecting a substantive due process analysis when the underlying action was a criminal prosecution, reasoning that:

> "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"

Id., 510 U.S. at 273, *quoting Graham v. Connor,* 490 U.S. 386, 395 (1989) ("*Graham* rule"). Thus, the touchstone for analysis of any claim for wrongful seizure is the probable cause standard

of the Fourth Amendment, from which any claim of wrongful criminal prosecution must derive[16]. *See id.*

In the same term, this Court also assessed the source law for any claim under § 1983 sounding in malicious prosecution and its close relative, abuse of process, not governed by the Fourth Amendment. *See Heck v. Humphrey,* 512 U.S. 477 (1994). The Court started with the general rule for interpretation of § 1983 that it "'creates a species of tort liability'"and that long-standing principles of the common law of torts "provide the appropriate starting point for inquiry under § 1983," *see id.,* 512 U.S. at 483; *Carey v. Pyphus,* 435 U.S. 247, 253, 258 (1978), subject to the necessity of conforming such principles to the controlling statutory meaning, purpose and intent of § 1983 as a general remedial provision for deprivations of constitutional rights, *see Wyatt v. Cole,* 504 U.S. 158, 164 (1992); *Carey,* 435 U.S. at 255-56. The Court then analyzed application of tort common law in respect to malicious prosecution, which it deemed to be most closely analogous to the claim at issue – wrongful conviction of a crime – as well as another common law tort, abuse of process, which the Court described as an "extortionate perversion of lawfully initiated process to illegitimate ends." *See Heck,* 512 U.S. at 484-86 & nn. 4-5. *See also Wyatt,* 504 U.S. at 164 (malicious prosecution and abuse of process as "closely analogous" torts to § 1983).

The Ninth Circuit rule re malicious prosecution and abuse of process claims, developed *pre-Albright*, requires proof that the prosecution is occurring for the purpose of depriving some specific constitutional right. *See Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir. 1985)(en banc). *Accord Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987) (quoting *Bretz v. Kelman).* The Ninth Circuit has also explained that the

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[16] Prior to *Albright*, the Circuits were divided into roughly four groupings in respect to malicious prosecution claims under § 1983: those who held that malicious prosecution, under standard tort elements, could be maintained under § 1983; those who held that there was no malicious prosecution claim under § 1983; those who permitted a malicious prosecution claim under § 1983 only with evidence of serious injury; and the Ninth Circuit, which permitted a malicious prosecution claim under § 1983 only with proof of an intent to deprive a constitutional right. *See Albright,* 512 U.S. at 271 & n.4 (and cases cited therein).

invocation of administrative or judicial proceedings may be tortious and actionable under federal civil rights laws if employed for a purpose that is unlawful and is other than and in addition to the goal sought openly in the proceeding itself. *Cf. Mayer v. Wedgewood Neighborhood Coalition,* 707 F.2d 1020, 1023 (9th Cir. 1983) (citing *inter alia California Motor Transport Co.,* 404 U.S. at 513-15).

In the instant action, the District Court reasoned that *Albright* had no bearing on claims for malicious prosecution or abuse of process arising out of an underlying civil action – since there is no seizure which would bring into play the more specific constitutional provisions of the Fourth Amendment, per the *Graham* rule – and hence concluded that the pre-*Albright* Ninth Circuit standard governed. Because Sexton's only asserted "intent to deny his constitutional rights" in the malicious prosecution was the alleged intent to retaliate under the First Amendment, and because the District Court rejected the First Amendment claim based on the finding that Sexton's speech in Sexton I and Sexton II was not a matter of public concern, the District Court concluded that Sexton's claims for malicious prosecution and abuse of process must fail as well[17]. [App. F, at 22a-25a, 28a-29a; App. H, at 34a-40a]. The Ninth Circuit affirmed judgment against Sexton on the malicious prosecution claims on the reasoning that *Albright* required proof that there was an underlying constitutional deprivation. [App. A, at 2a].

A.THE SUPREME COURT DECISION IN *ALBRIGHT V. OLIVER* LEFT OPEN THE QUESTION OF WHETHER AND UNDER WHAT CIRCUMSTANCES MALICIOUS PROSECUTION OR ABUSE OF PROCESS CLAIMS

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[17] The Ninth Circuit has not directly addressed, in any published decision, what effect *Albright* had on its unique rule for malicious prosecution claims, requiring an additional element that there be an intent to deprive some other constitutional right. In *Haupt v. Dillard,* 17 F.3d 285 (9th Cir. 1994), the Ninth Circuit noted the then recent *Albright* decision, but declined to address its application once it affirmed judgment against plaintiff based on collateral estoppel from the prior underlying criminal prosecution. *See id.,* 17 F.3d at 290. In *Poppell v. City of San Diego,* 149 F.3d 951, 962 (9th Cir. 1998), the Ninth Circuit simply noted, without comment, that the District Court had applied the pre-*Albright Bretz-Usher* rule, as did the District Court in the instant case.

MAY BE MAINTAINED FROM AN UNDERLYING CIVIL ACTION AS SUBSTANTIVE DUE PROCESS VIOLATIONS UNDER 42 U.S.C. § 1983

Despite differing views of the Circuits concerning malicious prosecution[18], there was at least one common denominator: No Circuit distinguished between claims based on underlying criminal and civil prosecutions, although nearly all cases factually involved the latter. *See Albright,* 512 U.S. at 271 & n.4 (and cases cited therein); *Usher,* 828 F.2d at 561-62 (9th Cir.) (same).

The practical effect of *Albright*, however, is to create that very distinction. In applying the *Graham* rule to require application of the Fourth Amendment, not substantive due process under the Fourteenth Amendment, to claims for malicious prosecution in criminal actions in which there was also a seizure – which is usually the case in criminal cases – that leaves entirely open the question of whether substantive due process affords the constitutional basis for claims for malicious prosecution of underlying civil actions in which there usually is no seizure which can be governed by the more specific provisions of the Fourth Amendment under the *Graham* rule[19].

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[18] For purposes of the balance of this petition, reference to malicious prosecution is intended to also refer collectively to that claim and the abuse of process claim also at issue in this action.

[19] In respect to application of *Albright* when the underlying action was a criminal prosecution, the Circuits have reflected a general state of uncertainty as to what *Albright* requires. *See Taylor v. Meacham*, 82 F.3d 1556, 1561 & n.5 (10th Cir. 1996). Some courts have read *Albright* to mean that a § 1983 malicious prosecution claim is actionable if it is based upon a Fourth Amendment violation. *See e.g, Singer v. Fulton County Sheriff*, 63 F.3d 110, 114 (2nd Cir. 1995); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). Others have interpreted *Albright* to mean that the exclusive constitutional basis for a § 1983 malicious prosecution claim is the Fourth Amendment's right to be free from seizure without probable cause. *See e.g, Taylor v. Meacham*, 82 F.3d at 1561. However, some post-*Albright* decisions still question whether a § 1983 malicious prosecution claim exists based upon a Fourth Amendment violation. *See e.g. Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001). Still others have left the door open for the possibility that such a claim may be based upon deprivation of a constitutionally protected right other than the Fourth Amendment. *See Torres v. McLaughlin*, 163 F.3d 169, 173 (3rd Cir. 1998); *Merkle v. Upper Dublin School District*, 211 F.3d 782, 792 (3rd Cir 2000). The Third Circuit, for example, has held that *Albright* does not require a § 1983 malicious prosecution claim to be based

Only one Circuit has expressly addressed the post-*Albright* availability of a malicious prosecution claim under § 1983 in respect to an underlying civil action with no Fourth Amendment implications, and held that it does not, reversing the pre-*Albright* rule of that Circuit. *See Lambert v. Williams,* 223 F.3d 257, 260-61 (4th Cir. 2000). The Fourth Circuit, however, added that:

> "[A]lthough the various opinions in *Albright* 'add[] up to a fairly strong sentiment against constitutionalizing malicious prosecution,' 1A Martin A. Schwartz, *Section 1983 Litigation* § 3.20 at 322 (3d ed. 1997), the decision itself ultimately does not reach the question. In the wake of *Albright,* the courts of appeals have diverged, some finding that § 1983 does not provide a malicious prosecution cause of action, some that it does, some that it might."

Id., 223 F.3d at 261 (cases omitted). Of course, all of the cases cited by *Lambert* involve underlying criminal prosecutions, amenable to Fourth Amendment remedies per *Albright.*

Conversely, while the Ninth Circuit has not expressly addressed this question in the context of an underlying civil action, district judges are assuming that its pre-*Albright* rule remains when the Fourth Amendment does not apply – as occurred in this case [App. H] – *i.e.* permitting malicious prosecution claims if accompanied by proof of an intent to deprive some other constitutional right. *See Poppell,* 149 F.3d at 962 (same assumption of trial judge therein).

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on the Fourth Amendment, but rather stands for the broader proposition that a section 1983 claim may be based on a constitutional provision other than the Fourth Amendment, including procedural due process, however, such a claim cannot be based on substantive due process. *See Torres*, 163 F.3d at 173; *Merkle*, 211 F.3d at 792. Some courts have interpreted *Albright* as an outright preclusion of substantive due process as a basis for a § 1983 malicious prosecution claim. *See Nieves v. McSweeney*, 241 F.3d 46, 53-54 (1st Cir. 2001); *Roche v. John Hancock Mutual Life Ins.*, 81 F.3d 249, 253-254; *Singer v. Fulton County Sheriff*, 63 F.3d 110, 114 (2nd Cir. 1995); *Meehan v. Town of Plymouth*, 167 F.3d 85, 88 (1st Cir. 1999); *See Torres v. McLaughlin*, 163 F.3d 169, 173 (3rd Cir. 1998); *Merkle v. Upper Dublin School District*, 211 F.3d 782, 792 (3rd Cir 2000).

Certainly, nothing in *Albright* precludes a malicious prosecution claim based on substantive due process where there is not a more specific constitutional provision that applies – *i.e.* where no Fourth Amendment violation is implicated where there exists no other constitutional provision to redress the deprivation. This case presents this question, as the underlying case was a civil action before the California WCAB, and did not involve any seizure nor any other act which would bring the Fourth Amendment or any other more specific constitutional provision into play.

In a different context, this Court addressed the inter-play between the *Graham* rule and substantive due process. *See County of Sacramento v. Lewis,* 523 U.S. 833, 841-844 (1998). In *Lewis,* in which the Court addressed whether the Fourth Amendment or substantive due process principles governed police liability during a high speed chase, the Court observed that:

> "'Graham simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.' Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment. It is not."

Id., 523 U.S. at 843, *quoting United States v. Lanier,* 520 U.S. 259, 272 n.7 (1997). The Court then proceeded to analyze that case based on substantive due process standards. *See also Franz v. Village of Bradford,* 245 F.3d 869, 877 (6th Cir. 2001) (applying similar analysis under substantive due process to malicious prosecution claim when Fourth Amendment does not govern facts).

Thus, the only lessons to be drawn from *Albright* is that substantive due process does not apply when there is a more specific applicable constitutional provision; and, whereas, in a malicious prosecution from a criminal action, there is the more specific Fourth Amendment, there is no such provision when the

underlying action was civil thereby permitting a substantive due process analysis.

B.MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS FROM UNDERLYING CIVIL ACTIONS SHOULD BE ACTIONABLE AS SUBSTANTIVE DUE PROCESS VIOLATIONS UNDER 42 U.S.C. § 1983 BASED ON COMMON LAW TORT ELEMENTS WITH PROOF OF INTENTIONAL CONDUCT

Since *Albright* does not preclude a malicious prosecution claim under § 1983, from an underlying civil action – neither by its terms nor the holding established by its facts – the remaining issue to be decided is whether malicious prosecution of a civil action or abuse of process, by a governmental entity or state actor, affords the basis for a § 1983 claim founded on a substantive due process analysis as applied in *County of Sacramento, supra.* In that vein, it is instructive to compare the relevant formulations of the substantive due process standard with the governing elements of a malicious prosecution claim as reflected in common law of torts.

The due process clause has a procedural component, and another substantive one which "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331 (1986); *Accord, County of Sacramento,* 523 U.S. at 840. The "due process clause was intended to prevent governmental officials 'from abusing [their] power, or employing it as an instrument of oppression.'[citations, internal quotes omitted)." *Id.*, 523 U.S. at 840. The Court explained further:

> "We have emphasized time and again that "the touchstone of due process is protection of the individual against arbitrary action of government [citation omitted] . . . or . . . the exercise of power without any reasonable justification in the service of a legitimate objective [citations omitted]."

Summing up, the Court declared that a claim for deprivation of substantive due process will require proof of actions which are arbitrary or shocks the conscience of the court, and that with rare exceptions a claim under the due process clause requires proof of intent. *See County of Sacramento, supra,*523 U.S. at 846-50; *Daniels,* 474 U.S. at 331.

Applying the common law tort elements for malicious prosecution requires proof that the plaintiff prevailed in the underlying action which was prosecuted without probable cause and with malice, *see Heck,* 512 U.S. at 484-86 & nn. 4-5; *Singer,* 63 F.3d at 118; Prosser & Keeton, Law of Torts, sec.119 at 874-75 (5th ed. 1984); Restatement (Second) of Torts sec.653(b) (1977), with malice in that context having been defined in the Ninth Circuit as "'a wish to vex, annoy or injure another person . . . the doing of an act for some improper or wrongful motive or purpose,'" *Poppell,* 149 F.3d at 962. *See also* Prosser, sec.119 at 871 (primary purpose other than the lawful objective). Abuse of process has also been similarly defined as requiring proof of an "extortionate perversion of lawfully initiated process to illegitimate ends." *see Heck, supra,*512 U.S. at 486 & n. 5; 8 S. Speiser, American Law of Torts secs.28:32-28:34 (1991).

The significance of these definitions and elements is that, if proved, they would establish a level of oppression and arbitrariness which commensurate with the expectations in a claim for a denial of substantive due process[20]. When the governmental and its officials – whom normally are afforded by the courts a presumption of regularity and that they are properly performing their duties, with provisions for various levels of immunity, *see generally Wyatt, supra* – abuse that public and

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[20] Thus, in context of underlying civil proceedings, the better rule is reflected by pre-*Albright* decisions which recognized a § 1983 malicious prosecution claim upon a showing of the traditional elements of common-law malicious prosecution in addition to an injury or deprivation of a constitutional magnitude, such as an egregious misuse of a legal proceeding. *See Torres v. Superintendent of Police of Puerto Rico,* 893 F.2d 404, 409 (1st Cir. 1990)(holding: to state claim under Section 1983, complaint must assert that malicious conduct was so egregious that it violated substantive or procedural due process rights under Fourteenth Amendment."); *Coogan v. Wixom,* 820 F.2d 170, 175 (6th Cir. 1987); *Lusby v. T.G. & Y. Stores,* 749 F.2d 1423, 1431 (10th Cir. 1984).

judicial trust and intentionally employ the machinery and process of the courts to secure unwitting judicial aid in acts of oppression which are unlawfully motivated or arbitrary, then surely there is conduct that should shock the conscience of any court.

Thus, the very definition of the common law torts of malicious prosecution, combined with the requirement that the acts be intentional, are such that if proved they clearly present the types of tortious conduct which is contemplated by the jurisprudence of substantive due process. Without the rubric of the Fourth Amendment – whose objective reasonableness standards actually set a lower threshold of official misconduct – there is no reason not to clarify the law so as to permit pursuit of malicious prosecution and abuse of process claims under § 1983 and substantive due process.

In this case, the employer filed twin WCAB actions against Sexton in July 1995, seeking to forcibly retire him on medical cardiac grounds which they knew to be unfounded – *i.e.* that the condition was benign and utterly nondisabling in the absence of any cardiac disease – because of:

(a) a complete lack of cardiac disease, as reflected by the employers' own medical records and annual testing of Sexton;

(b) repeated medical expert opinions from their own cardiac expert in 1991 [Hyman]; from Sexton's own treating cardiologists from 1991 - 1995 [Mendiones & Dasgupta]; from an outside cardiac expert retained by Sexton in early 1995 [Weiner]; and from an expert retained by the County in Sexton I in 1994 [Kirschbaum];

(c) the expert they attempted to rely on was a mere "forensic internist" [Markovitz] who was not a proper WCAB expert because he was not a treating cardiologist as required under WCAB rules, and who initially agreed with all cardiologists re Sexton; then switched his view under pressure from defendants; and then withdrew his reversal when confronted with reports from the cardiologists; and

(d) when defendants finally sent Sexton to be examined, in the WCAB proceedings, by the cardiologist which they should and could have sent him to [Villalobos], he concurred in the prior cardiologists' consensus, and *voila* Sexton was

returned to his normal work and the WCAB proceedings were dismissed on motion of Sexton's counsel in September 1996.

If a governmental entity and its officials are intentionally seeking by litigation to deprive a person of a significant property or liberty interest, without any probable cause therefor and with the type of arbitrary and oppressive conduct reflected herein to force that person's resignation – or worse yet, with actual knowledge of its factual or legal insufficiency – such conduct clearly is an abuse of power that is intended to be remedied by the due process clause.

If there is no viable § 1983 malicious prosecution or abuse of process claim where the underlying prosecution is a civil proceeding, then there is a rule that allows an injury without a remedy. Such a rule would allow an employer to engage in the most egregious misconduct of initiating a baseless civil or administrative proceeding against an employee and thereby depriving the employee of his or her job or compensation without affording the employee any remedy.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 27, 2001]

No.: 99-56825 / D.C. No.: SA-CV-95-534-GLT

FRANKLIN SEXTON,
Plaintiff-Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,
RAY O. SHACKLEFORD,
as an individual and in his official capacity as District Fire Chief;
AL GRAMS,
as an individual and in his official capacity as District Fire Chief;
SOUTHERN CALIFORNIA RISK MANAGEMENT ASSOCIATES, INC.,
a California Corporation and public entity insurance carrier,
Defendants-Appellees.

MEMORANDUM [1]

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted January 8, 2001,
Pasadena, California

Before: TROTT, THOMAS, and BERZON, Circuit Judges.

Sexton appeals the district court's grant of summary judgment on his claims and Defendants cross-appeal the district court's denial of attorneys fees. We affirm. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

1. The district court properly granted summary judgment on Sexton's claim under 42 U.S.C. § 1983 that the Defendants intended to deprive Sexton of his First Amendment right to petition the government by retaliating against him for his prior assertion of claims. A public employee's litigation must involve a matter of public concern in order to be protected by the Petition Clause. *Rendish v. City of Tacoma*, 123 F3d 1216, 1220 (9th Cir. 1997). Sexton's prior litigation only involved his individual personnel disputes and grievances; it did not involve matters of public concern. Thus, his § 1983 claim is not legally viable. *Roe v. City & County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997). Absent an underlying constitutional violation, Sexton's § 1983 claims for malicious prosecution and abuse of process also fail. *Albright v. Oliver*, 510 U.S. 266, 27071 (1994).

2. Sexton's claim under 43 U, S.C. § 1985(2) fails because he failed to tender sufficient evidence of an agreement or meeting of the minds by the Defendants to violate his constitutional rights. *Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989). Given our resolution of this cause of action on this basis, we need not reach the

viability of a claim of intra-governmental conspiracy under § 1985(2).

3. The district court correctly granted summary judgment on Sexton's substantive due process claim because the undisputed evidence shows that any deprivation of an ability to pursue his occupation was temporary. *Cf Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 65 (9th Cir. 1994).

4. The doctrine of res judicata bars "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action, if the prior suit concluded in a final judgment on the merits." *Ross v. Int'l Bhd. of Elec. Workers*, 634 F.2d 453, 457 (9th Cir. 1980). By his settlement of all claims in his first lawsuit, which was entered as a judgment in that case, Sexton is precluded from asserting claims that he alleged or could have alleged in his prior lawsuit. Thus, his renewed claim for reinstatement was properly dismissed by the district court.

5. Assuming, *arguendo*, that Sexton had a protectable property interest in his position as an engineer, he was not denied his right of procedural due process. He was not entitled to a pre-deprivation hearing before being placed on disability because of the significant public safety interest in ensuring that active fire-fighters would be able to perform rigorous activity under stressful conditions. *Cf. Barry v. Barchi*, 443 U.S. 55, 64, 65 (1979). In the unique context of this case, the remedies afforded by the California Workers' Compensation system were adequate for Sexton to challenge his employer's decision to place him on disability status. However, rather than contesting his disability before the California Workers' Compensation Appeals Board, he accepted the benefits of the system. Having failed to pursue those remedies, he is precluded from doing so here. *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976).

6. Exceptional circumstances are required before defendants are allowed recovery of attorneys' fees in civil rights cases. *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990). The district court found that Sexton's claims were not frivolous, vexatious or harassing. These findings were not clearly erroneous, and the district court did not abuse its discretion in denying Defendants' motion for attorneys' fees.

7. Defendants are awarded costs on appeal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed September 9, 1994]

No.: SACV-90-616-GLT (RWRx)

FRANKLIN SEXTON,
Plaintiff,

v.

COUNTY OF SAN BERNARDINO
Et al.
Defendants.

ORDER CLARIFYING SUMMARY ADJUDICATION AND UNIFIED JUDGEMENT

Plaintiff's Motion to Clarify and to Enter a Single Unified Judgement having come on for hearing, counsel of record for all parties appearing, and good cause both portions of the motion showing therefor

IT IS HEREBY ORDERED that Plaintiff's Motion to Clarify is granted, as stated in the Court's Minute Order;

IT IS HEREBY FURTHER ORDERED that Plaintiff's Motion to Enter a Single Unified Judgement is granted;

IT IS HEREBY FURTHER ORDERED that Judgement be entered herein as follows:

(1) Individual defendants Vernon Knourek, Pat Quick and Bruce Clark, to the extent they are sued in their individual capacities, are granted qualified immunity as to plaintiff's procedural due process claim arising from plaintiff's demotion from captain in March 1990;

(2) Defendants County of San Bernardino, and Vernon Knourek and Pat Quick in their official capacities, and the entities which Knourek and Quick represented in their official capacities, deprived plaintiff's due process rights in that;

(a) Plaintiff had a property interest in the rank of captain when he was demoted in March 1990;

(b) By stipulation of the parties, plaintiff was afforded no due process at all when he was demoted from captain.

(3) The Court's findings of fact and conclusions of law, issued orally from the bench, are made a part of this Judgement, and the reporter's transcript thereof shall be prepared, at plaintiff's expense, filed with this Court, at which time it will be deemed a part of this Judgement as if fully set forth herein.

(4) Defendants Harry Mays and Daniel Schuler, sued in their official capacities only, are dismissed without prejudice, by stipulation of the parties.

(5) Defendant Chino Valley Independent Fire District is dismissed with prejudice, by stipulation of the parties.

IT IS HEREBY FURTHER ORDERED that, except as expressly provided herein, all of plaintiff's claims and defendants' defenses, as reflected by the most recent pleadings, remain to be litigated herein.

Dated: 9/9/94/s/_____
Judge of the District Court
SUBMITTED BY:

/s/ _____

Meir J. Westreich
Attorney for Plaintiff

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed August 10, 1996]

No.: SACV-90-616-GLT (EEx)

FRANKLIN SEXTON,
Plaintiff,

v.

COUNTY OF SAN BERNARDINO
Et al.
Defendants.

JUDGEMENT ON OFFER AND ACCEPTANCE
[Federal Rules of Civil Procedure 68]

Defendants VERN KNOUREK, PAT QUICK, and BRUCE CLARK, in their official and individual capacities, BOARD OF SUPERVISORS FOR THE COUNTY OF SAN BERNARDINO, CAN BERNARDINO COUNTY FIRE AGENCY, CHINO RURAL FIRE PROTECTION DISTRICT, COUNTY SERVICE ARES 70, and COUNTY OF SAN BERNARDINO, having offered in a writing served and filed with the District Court, to allow the Plaintiff, FRANKLIN L. SEXTON, to take judgement against them, pursuant to Federal Rules of Civil Procedure 68, as follows:

1. That Plaintiff agrees to accept the total sum of $250,000.00 for personal injuries, inclusive of costs and attorney's fees for all claims. Plaintiff agrees that the only sum he can receive herein is the sum of $250,000.00;

2. That in the event a third party, including CHINO VALLEY INDEPENDENT FIRE DISTRICT, institutes any legal action against any settling Defendant herein arising out of the terms of this Offer of Judgement or the subject matter of this lawsuit, Plaintiff shall defend and hold harmless said Defendant in said third party litigation.

3. That in exchange for acceptance of the monetary consideration for said Judgement, this will resolve said lawsuit and the issues there in their entirety.

The offer to allow judgement having been served by Defendants on Plaintiff on August 22, 1996; and

Plaintiff having thereafter, on August 27, 196, served upon the Defendants' attorneys, Dennis Wagner, Deputy County Counsel for San Bernardino County and Dennis Mahoney, MacLachlan, Burford & Arias, and filed with the District Court, notice that Plaintiff accepted the offer by all named Defendants, pursuant to Federal Rules of Civil Procedure 68.

THEREFORE, JUDGEMENT is accordingly entered in favor of Plaintiff and against all of the above-named Defendants, as set forth in the Offer of Judgement.

Dated: August 30, 1996

/s/_____
GARY L. TAYLOR
JUDGE OF THE
DISTRICT COURT

The preceding Judgement, pursuant to Federal Rules of Civil Procedure 68, is approved as to form and content.

Dated August 29, 1996

ALAN K. MARKS
County Counsel

By:/s/
Dennis E. Wagner, Attorneys for Defendants, COUNTY OF SAN BERNARDINO, COUNTY SERVICE AREA 70, VERN KNOUREK, PAT QUICK, BOARD OF SUPERVISORS FOR COUNTY OF SAN BERNARDINO, SAN BERNARDINO COUNTY FIRE AGENCY, AND CHINO RURAL FIRE PROTECTION DISTRICT

Dated: August 29, 1996

MacLACHLAN, BURFORD & ARIAS

By: /s/_____
JOSEPH ARIAS, Attorneys for BRUCE CLARK

The preceding Judgement, pursuant to Federal Rules of Civil Procedure 68, is approved as to form and content.
Dated: August 28, 1996 Submitted by:

/s/_____
MEIR J. WESTREICH
Attorney for Plaintiff

APPENDIX D

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

[Filed April 23, 1997]

FRANKLIN SEXTON,
SS#: 552-98-9153
Applicant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT; SOUTHERN CALIFORNIA RISK MANAGEMENT
Defendants.

ORDER DISMISSING CASES

Pursuant to motion of Applicant, and

GOOD CAUSE APPEARING:

IT IS ORDERED that Case Numbers SBR 0258390 and SBR 0258393 be and they hereby are dismissed.

/s/_____

GUIDO J. CASARI, JR.
WORKERS' COMPENSATION JUDGE
San Bernardino, California
Served By Mail on Persons Shown
on the Official Address Record.
Effective: 4-23-97
By: /s/ _____
S. Nelson

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed April 28, 1997]

No.: SA-CV-95-534-GLT

FRANKLIN SEXTON,
Plaintiff,

v.

CHINO VALLEY INDEPENDENT
FIRE DISTRICT, et al.
Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

Defendants' motion for summary adjudication of Plaintiff Franklin L. Sexton's cause of action for violations of procedural due process is GRANTED. The motion for summary adjudication of the issue of judicial estoppel is DENIED.

I. BACKGROUND

This motion involves two cases filed by Sexton resulting from a medical diagnosis in 1994. *Sexton I* began in 1990, and involves Sexton's demotion without due process. This motion concerns *Sexton II*, which was filed in 1995.

Sexton filed a Fourth Amended Complaint naming the Chino Valley Independent Fire District, Ray Shackelford, Al Gramms, and Southern California Risk Management Associates, Inc. as defendants. The Chino Valley Independent Fire District is the successor to the Rural District of *Sexton I*. Ray Shackelford is former fire chief of the District. Al Gramms is Shackelford's successor and present fire chief of the District. Both are being sued in their individual and official capacities. The Southern California Risk Management Associates, Inc. ("SCRMA") is the public entity insurance carrier for the District.

The connection between *Sexton I* and *Sexton II* is Sexton's heart condition. In early 1990, Sexton was placed on three months medical leave by the District because his annual test had shown a heart arrhythmia. At that time, Sexton did not seek worker's compensation, but instead chose to seek damages for the heart arrhythmia as consequential damages resulting from the stress caused by the actions alleged in *Sexton I*. In April 1994, Sexton was placed again on medical leave by the District because another test had shown a heart arrhythmia. The District referred Plaintiff to a heart specialist, Dr. Alvin Markovitz

Dr. Markovitz decided Sexton's arrhythmia was neither dangerous nor disabling. Based on Dr. Markovitz's conclusions, Sexton returned to work in early May 1994 to his post as Engineer. On May 11, 1994, Dr. Markovitz altered his diagnosis, allegedly in reaction to pressure put on him by agents of the District to change his medical report. Consequently, on June 3, 1994, Sexton again was placed on medical leave. Despite the District's insistence, Plaintiff refused to file a claim for worker's compensation. The District placed Plaintiff on disability pay under California Labor Code § 4850.

In December 1994, Defendant Gramms issued a directive removing Sexton from his designation under Labor

Code § 4850, placing him on involuntary administrative leave. On February 22, 1995, Sexton returned to work performing only administrative duties, but maintained his normal Engineer's salary. On July 12, 1995, Dr. Markovitz again examined Sexton and found Sexton's condition had not changed since his last examination. According to Plaintiff, on July 14, 1995, Defendants initiated an application with the Workers' Compensation Appeals Board for the purpose of declaring Sexton permanently disabled with the intent of permanently retiring Sexton as disabled. Based on the above facts, Sexton alleges violations of 42 U.S. §§ 1983, 1985, and 1986. Sexton claims violations of both his procedural and substantive due process rights resulting from his forced placement on disability leave. He also claims a violation of his First Amendment right to petition the government for redress of grievances, because he has been listed as disabled in retaliation for filing his lawsuit in *Sexton I*.

In the Fourth Amended Complaint, Sexton alleges causes of action arising from the parties, inadequate response to evidence Dr. Markovitz recanted his opinion regarding Sexton's permanent disability in March 1996. The District has moved for summary adjudication of two issues: (1) Sexton was not deprived of procedural due process because adequate procedures for disputing his diagnosis were available through the Workers Compensation Appeals Board; and, (2) Sexton Is judicially estopped from asserting he was qualified to do his job because he has previously accepted disability payments and a settlement in part because he claimed he was unable to do his job.

II. DISCUSSION

Upon a showing there is no genuine issue of material fact as to particular claims or defenses, the court may grant summary judgment on any part of the claim. Fed. R. Civ. P. 56. The Local Rules allow the Court to decide a motion for adjudication of particular facts and issues under Rule 56.

Local Rule 7.14.4. To grant a motion for summary adjudication, the Court must find no reasonable jury could return a verdict for the non-moving party on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986)(discussing standard for summary judgment).

To survive a motion for summary adjudication, the nonmoving party must produce evidence that could cause reasonable persons to disagree on whether the facts claimed by the moving party are true: "enough to require a jury or judge to resolve the parties' differing versions of the truth." *Aydin v. Loral Corp*, 718 F.2d 897, 902 (9th Cir. 1983). Furthermore, the court must view the evidence presented in the light most favorable to the nonmoving party, with "all justifiable inferences . . . drawn in his favor." *Anderson*, 477 U.S. at 255.

1. Procedural Due Process

To establish a violation of procedural due process rights, a plaintiff must demonstrate (1) the plaintiff was deprived of a property or liberty interest, as determined by state law; and (2) the process that was due the plaintiff was denied. *Knudson v. City of Ellensbarg*, 832 F.2d 1142, 1144 (9th Cir. 1987). The process Sexton contends he was due consists of "reasonable notice of the charge and the information on which it is based, and a reasonable opportunity to appear and rebut the charges before a hearing officer who is willing to consider the evidence in rebuttal or mitigation before making a final decision." Op. to Mot. for Sum. Adj . pp. 23-24 (citing *Sanchez v. City of Santa Ana*, 915 F.2d 424, 429-30 (9th Cir. 1990).

An individual's right to procedural due process is not violated "until and unless the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126-27 (1990). Consequently, if a plaintiff fails to use the administrative or judicial remedies admittedly provided by the state, the plaintiff must demonstrate resort to those procedures would

be futile to state a procedural due process claim. *Maples v. Martin*, 858 F.2d 1546, 1551 (11th Cir. 1988). A procedural due process claim is not ripe for review until a plaintiff pursues existing procedures or alleges the procedures were clearly insufficient at the time they were offered. *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976) (plaintiff cannot state a procedural due process claim after electing to forego a hearing). *See also Correa v. Nampa School Dist.*, 645 F.2d 814 (9th Cir. 1981).

Sexton contends the Defendants deprived him of protected property interests in his overtime pay and his rank as an engineer when they placed him on disability. Additionally, he asserts he was entitled to a hearing before those rights were terminated, citing *Sanchez*, 915 14 F.2d 424 and *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991).

Sexton had no property interest in his overtime pay. Sexton admitted in his deposition he had no expectation of receiving overtime pay and the Defendants never promised to give him overtime pay. At the very least, a property interest must be secured by "existing rules or understandings" between the parties. *Perry v. Sindermann*, 408 U.S. 201 593, 601 (1972). Sexton's testimony demonstrates Sexton and the District had come to no understanding relating to overtime pay.

Sexton may, however, have had a protectable property interest in his rank as an engineer. *McGraw v. City of Huntington Beach*, 882 F.2d 384, 387-90 & n.11 (9th Cir. 1989) (property interest attaches once promoted employee completes probationary period). Sexton asserts he was deprived of a protected property interest when he was "de facto demoted" to a glorified clerical worker from the position of engineer.

Termination of public employment which has a due process protection requires a pre-termination hearing. *Walker*, 951 F.2d 182, 3 184 (9th Cir. 1991). Sexton similarly asserts

he was entitled to a hearing before this de facto demotion. *Walker*, however, involved the termination of an individual's employment which, under the defendant City's regulation, could be terminated only for cause. Id. The other cases cited by Sexton similarly involve individuals whose employment was terminated, including the case Sexton cites in support of his claim to a property interest in his rank. *McGraw*, 882 F.2d 384 10 (employee was summarily terminated while on probationary period for a position to which she was promoted). Sexton Is not asserting the same right asserted in those cases.

To determine whether a hearing is required before deprivation of the rights at issue, the Court must balance the private right or interest that will be affected against the risk of an erroneous deprivation through the procedures used and the additional cost and administrative burdens additional procedures would entail. *Brady v. Gebbie*, 859 F.2d 1543, 1554 (9th Cir. 1988). The right Sexton asserts is the undefined interest in his rank, but there is no allegation this demotion would have a lasting or permanent impact and Sexton's salary remained the same. Although there may be some risk of erroneous deprivation from confining a healthy individual to light administrative duty, the District took no action until it received medical reports concluding Sexton should not be driving fire engines. Most important, California law apparently precludes a pre-deprivation hearing in these circumstances.

Under the California Worker's Compensation system, any heart condition manifesting in a fire fighter during the course of active service "shall be presumed to arise out of and in the course of the employment." Cal. Lab. Code § 3212. This presumption may be rebutted by other evidence, but, in the absence of such evidence, the presumption is binding on the Worker's Compensation Appeals Board (WCAB). Once the Defendants became aware of Sexton's condition, a

presumptively work-related heart condition, they had a legal obligation to file a disability claim Cal. Lab. Code 5402. California law creates a situation where quick action is necessary and additional pre-deprivation procedures are impractical. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (post deprivation procedures inadequate unless quick action required or pre deprivation hearing is impractical).

Additionally, the post-deprivation procedures available immediately upon filing the claim with the WCAB adequately protect any interest Sexton had in his rank. Once the Worker's Compensation process began, Sexton was statutorily entitled to a hearing before the WCAB if he so requested. Cal. Lab. Code § 4851. Sexton submits no evidence he requested a hearing or otherwise opposed the Defendant's claim before the WCAB or sought a second opinion about his heart condition during the time he was receiving worker's compensation benefits. Nor does Sexton allege the WCAB procedures were foreclosed to him or that pursuing his claim with the WCAB was futile. Consequently, Sexton cannot establish a procedural due process claim as a matter of law, and the motion for summary adjudication is GRANTED.

2. Judicial Estoppel

Defendants contend Sexton Is judicially estopped from asserting he was qualified to perform his duties as a fire engineer during the time he was receiving worker's compensation benefits. The doctrine of judicial estoppel precludes a party from gaining an unfair advantage by taking one position and then taking an incompatible position later. *Rissetto v. Plumbers Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996). In *Rissetto*, the Ninth Circuit found a woman who applied for California worker's compensation benefits necessarily asserted she was unable to work and could not later assert she was performing her job adequately to recover

damages in an age discrimination case against the same employer for the same period of time. Id.

Similarly, Defendants seek to estop Sexton from asserting he was qualified to perform his duties because Sexton received disability benefits for several months and because he settled his lawsuit in *Sexton I* for $250,000. In *Sexton I*, Sexton sought to recover damages against the entities he alleged caused his heart condition. However, Sexton distinguishes between the "injury" he alleged in that case and "disability" claimed by plaintiffs in the judicial estoppel cases cited by Defendants. Sexton contends he accepted a doctor's conclusion he was injured, but has never claimed he was disabled. In addition, Sexton never filed a worker's compensation claim, but accepted the benefits he received as a result of the claim filed by Defendants. Sexton now alleges he uncovered evidence the doctor fraudulently mis-diagnosed his heart condition, at the behest of the defendants, in an attempt to force him to retire. This unique factual situation, apparently not present in the judicial estoppel cases the District cites, explains the otherwise contradictory statements made in the context of the two separate lawsuits. The claimed fraudulent conduct by defendants changes what might otherwise be a judicial estoppel. At the very least, there are factual issues about whether Sexton believed or asserted he was disabled. His credibility and inconsistent statements are matters of fact to be assessed at trial and not to be decided by way of summary adjudication. The motion for summary adjudication of the judicial estoppel issue is DENIED.

III. DISPOSITION

Defendants' motion for summary adjudication is GRANTED IN PART AND DENIED IN PART.

DATED: 04-28-97

/s/_____
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed March 5, 1999]

No.: SA-CV-95-534-GLT (Eex)

FRANKLIN SEXTON,
Plaintiff,

v.

CHINO VALLEY INDEPENDENT
FIRE DISTRICT, et al.
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Court GRANTS Defendants' Motion for Summary Judgment on Plaintiff's § 1983 and substantive due process claims. The Court does not now reach Plaintiff's claim under 42 U.S.C. § 1985(2). The Court requests additional briefing on this issue according to the schedule set out in Section VI.

I. Plaintiff's First Amendment Claim Under § 1983

In order to succeed on a 42 U.S.C. § 1983 claim for First Amendment retaliation, a plaintiff must prove:

(1) the conduct at issue is constitutionally

protected;

(2) the conduct was a substantial or motivating factor in the employer's action, and

(3) even if these elements are satisfied, plaintiff must show the government would not have taken the same action even in the absence of the protected conduct. *Brewster v. Lynwood*, 149 F.3d 971, 978 (9th Cir. 1998).

In order to merit First Amendment protection, a public employee's speech must pertain to a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 140 (1983). Plaintiff brings his claim under the Petition Clause, which protects citizens' access to the courts. Plaintiff claims the public concern requirement applies to the Speech Clause, but not to the Petition Clause. The Ninth Circuit recently held to the contrary in *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997) : "We hold that a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the First Amendment." Thus Plaintiff's claims must be of public concern to merit First Amendment protection.

In *Roe v. City & County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997), the Ninth Circuit defines speech by public employees as "not of public concern" when it "deals with individual personnel disputes and grievances" and "when that information would be of no relevance to the public evaluation of the performance of governmental agencies." The Roe court goes on to state " [t]he focus must be upon whether the public or community is likely to be truly interested In the particular expression, or whether it is more properly viewed as essentially a private grievance." Id. at 585.

Matters of public concern, on the other hand, encompass subjects of importance beyond a single employee's interests, such as "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities." *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir.

1995). Statements relating to any matter of political, social, or other concern to the community are protected. *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989). Defendant contends Plaintiff's claims for back pay, rank, and worker's compensation are not issues of public concern. Plaintiff counters by stating a "public employee's complaint concerning matters governed by civil rights laws is quintessentially a matter of public concern." Plaintiff further states the fact that a petition alleging unconstitutional conduct necessarily has a private component does not preclude a finding that the speech addresses matters of public concern.

Allegations of unconstitutional conduct do not, however, automatically address matters of public concern. Plaintiff's suit is essentially personal in nature: he alleges he was removed from his position and deprived of wages and of the opportunity to work.

The Ninth Circuit has stated a useful factor in examining whether speech is private or public is whether the employee spoke in order to bring wrongdoing to light or merely to further some purely private interest. *Havekost v. U.S. Dept. of Navy*, 925 F.2d 316, 318 (9th Cir 1991). Here, Plaintiff sues to vindicate his personal rights. He does not sue on behalf of others, and he has not conducted his suit such a manner as to "reach the general public." *Havekost*, 925 F.2d at 319.

In *Sexton I*, Plaintiff alleged he was wrongfully demoted, that he received inaccurate and false personnel evaluations, and he was deprived of his right to pursue his chosen occupation. In *Sexton II*, Plaintiff has alleged he was wrongfully put on disability due, interalia, to Defendants' encouraging Dr. Markovitz to change his evaluation. These are private matters which do not rise to the level of "broader societal concern" required to constitute public speech. *Roe*, 109 F.3d at 585. The prior speech against which Plaintiff claims Defendants have retaliated is not public speech which

would trigger the protections of the First Amendment.

Since Plaintiff has failed to satisfy the first prong of the test set out in *Brewster v. Lynwood*, supra, the Court does not reach the second and third prongs.

II. Plaintiff's § 1985(2) Claim

Plaintiff also states his right of access to the courts has been violated under 42 U.S.C. § 1985(2), which provides a remedy:

> If two or more persons . . . conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . .

There is no requirement of class-based animus in an action alleging denial of access to the federal courts under the first clause of § 1985 (2) , which is the clause under which Plaintiff sues. *Kush v. Rutledge*, 460 U.S. V19, 726 (1983). In *Portman v. County of Santa Clara*, 995 F.2d 898, 909 (9" Cir. 1993), the Ninth Circuit held § 1985 (2) provides a remedy for those who have "proved that they were denied [employment opportunities as a result of a conspiracy] because they previously had instituted legal actions to vindicate their federal rights . . . even where they had no constitutionally protected property interest in the job."

The elements of a claim under §1985 (2) are: (1) a conspiracy by the defendants; (2) to injure a party or witness in his or her person or property; (3) because he or she attended federal court or testified in any matter pending in federal court; (4) resulting in injury or damages to the plaintiff. *Portman*, 995 F.2d at 909.

The circuits are split as to whether members of a

government entity can conspire within the meaning of § 1985 (2). The Ninth Circuit has never addressed this question directly. *Portman*, 995 F.2d at 909 (citing *Padway v. Palches*, 665 F. 2d 965, 969 (9th Cir. 1982); *Mustafa v. Clark Co. Sch. Dist.*, 157 F.3d 1169, 1181 (9th Cir.1998) (stating Ninth Circuit still has yet to decide this question). The Eight Circuit held a complaint alleging a conspiracy involving members of a tribal council failed to state a claim under § 1985 since a governmental body cannot conspire with itself and the individual members, acting in their official capacity, "cannot conspire when they act together . . . in taking official action on behalf of the [governing body.]" *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985).

Other courts have rejected this "intra-corporate conspiracy" doctrine. *See, e.g., Novotny v. Great American Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1256-59 (3d Cir. 1978), rev'd on other grounds 442 U.S. 366 (1979) (the Supreme Court acknowledged, but did not resolve, the circuit split); *Rebel Van Lines v. City of Compton*, 663 F.Supp. 786 (C.D.Cal. 1987) (rejecting application of intra-corporate conspiracy doctrine to § 1985 cases, especially in government context). The *Portman* court declined to take a position on this question, as the parties had not briefed the issue.

The circuits are also split on the third part of the § 1985(2) test, regarding the proper interpretation of the term "attend[] or testif[y]." The Fifth Circuit has held these terms refer to Congress's intent to protect a party "based on his physical presence while attending or testifying in court." *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. 1981) (en banc). Thus, according to the Fifth Circuit, § 1985(2) does not provide a remedy against retaliation for the filing of a lawsuit. Id. The Tenth Circuit has held "for purposes of § 1985(2), an individual is deemed to have 'attended' a court of the United States from the moment that the person files a complaint." *Wright v. No Skiter, Inc.*, 774

F.2d 422, 425 (10th Cir. 1985); *see also Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983)(same). The *Portman* court also declined to rule on this issue.

The parties in the case at bar have not joined issue on the question of whether Plaintiff has a remedy under 42 U.S.C. § 1985(2). The Court requests additional briefing on this issue.

III. Plaintiff's Substantive Due Process Claim

Plaintiff claims (1) his career has been substantially damaged; and (2) the taking of his career opportunity has been so egregious that no procedural safeguards could make up for the damage. Plaintiff claims Defendants have violated his substantive due process rights.

The Ninth Circuit has recognized the Due Process Clause of the Fourteenth Amendment to the United States Constitution confers both procedural and substantive rights. *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1994). However, "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited." Id. at 1319. The *Armendariz* court goes on to state:

> [R]ecent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties deeply rooted in this Nation's history and tradition. Thus, the Fourteenth Amendment protects against a State's interferences with personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, as well as with an individual's bodily integrity. . . . [W]e must pause before unnecessarily invoking substantive due process not grounded in explicit protections in specific amendments because guideposts for responsible decision making in this unchartered area are scarce and open-ended.

Id. at 1318-19 (citations omitted).

Plaintiff claims Defendants have violated his substantive due process right to pursue the career of his choice by preventing him from being a fire engineer. This Court has previously stated Plaintiff suffered at worst a temporary change of duties, but "there is no allegation this demotion would have a lasting or permanent impact and Sexton's salary remained the same." See Order of April 27, 1997, at p. 6, 11. 19-21.

Plaintiff cites a post-*Amendariz* decision of the Ninth Circuit, *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56 9th Cir. 1994). In *Wedges/Ledges*, plaintiffs sued a municipality because it would not permit plaintiffs' arcade game to be played within city limits. Id. at 65. Plaintiffs claimed a substantive due process violation because they alleged this policy deprived them of the opportunity to engage in the occupation of their choice. Id. The court held a temporary ban did not establish plaintiffs were prohibited from pursuing their livelihood. Id. Plaintiff is currently working as a fire engineer, which is his chosen profession. From 1994 to 1996 he was on disability or administrative leave, but this Court has held this was only a temporary change of duty. Plaintiff cannot sustain his claim for a substantive due process violation given the Ninth Circuit's recent decisions in this area.[1]

IV. Malicious Prosecution

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[1]At oral argument, Plaintiff suggested an additional substantive due process interpretation based upon *Rutherford v. Berkeley*, 780 F.2d 1444 (9th Cir. 1985). *Rutherford* has been abrogated by the Ninth Circuit, but Plaintiff stated *Rutherford's* substantive due process theory has been "recently cited with approval." Plaintiff's Opp. at 26. The Court has reviewed the recent case law in this area and declines to extend the *Rutherford* analysis to the present case. Even if *Rutherford* were to apply, the Court holds Defendants' actions in this case do not "shock the conscience" so as to support a substantive due process claim.

Plaintiff defends his malicious prosecution claim in his opposition, but Defendant has not moved for summary judgment on that claim. Since the parties have not joined issue on that claim, the Court will not decide it at this time.

V. Qualified Immunity

Plaintiff claims Defendant Fire Chief Grams violated Plaintiff's constitutional rights by filing the worker's compensation claim on Plaintiff's behalf. The Court need not address the question of qualified immunity on Plaintiff's § 1983 and substantive due process claims because the Court has found Defendants (including Grams) did not violate Plaintiff's First Amendment and substantive due process rights. The Court will not rule on whether Grams has qualified immunity from Plaintiff's § 1985(2) claim until the parties have further briefed the Court on this issue.

VI. Disposition

Defendants' Motion for Summary Judgment is GRANTED on Plaintiff's § 1983 and substantive due process claims. The Court does not reach Plaintiff's claim under 42 U.S.C. § 1985(2). The Court requests additional briefing on this claim according to the following schedule:

(1) Defendant's supplemental motion on Plaintiff's § 1985 claim is due Monday, March 22, 1999;

(2) Plaintiff's opposition is due Monday, March 29,1999; and

(3) Defendant's reply is due Monday, April 5,1999.

DATED: March 5, 1999.

/s/_____

GARY L. TAYLOR

UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed August 3, 1999]

No.: SA-CV-95-534-GLT(Eex)

FRANKLIN SEXTON,
Plaintiff,

v.

CHINO VALLEY INDEPENDENT
FIRE DISTRICT, et al.
Defendants.

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION ON PLAINTIFF'S § 1985(2) CLAIM

Additional briefing has been received on Plaintiff's § 1985(2) claim. The Court GRANTS Defendant's Motion for Summary Adjudication on that issue.

Plaintiff alleges Defendants violated his right of access to the courts under 42 U.S.C. §1985(2). The elements of a §1985(2) claim are: 1) a conspiracy by the defendants; 2) to injure a party or witness in his or her person or property; 3) because he or she attended federal court or testified in any matter pending in federal court; 4) resulting in injury or

damages to the plaintiff. *See Portman v. County of Santa Clara*, 995 F.2d 898, 909 (9th Cir.1993).

A. Intra-Corporate Conspiracy

The Ninth Circuit has not decided the issue of whether members of a government entity can conspire within the meaning of §1985(2). *See Mustafa v. Clark Co. Sch. Dist.*, 157 F.3d 1169, 1181 (9th Cir . 1998) (stating Ninth Circuit has yet to decide this question). The intra-corporate conspiracy doctrine states "a corporation cannot conspire with its agents or employees acting within the scope of their employment." *Girard v. 94th St . & Fifth Ave, Corp.*, S30 F.2d 66, 74 (2nd Cir. 1976). Courts have applied this doctrine to §1985 cases, holding a governmental body cannot conspire with itself, and the individual members of the body, acting in their official capacity, "cannot conspire when they act together." *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *see also Portman*, 955 F.2d 909 (citing *Lieberman v. Gant*, 474 F.Supp. 848, 875 (D.Conn. 1979) aff'd, 630 F. 2d 60 (2d Cir . 1980), *Dombrowski v. Dowling*, 459 F. 2d 190, 196 (7th Cir.1972)).

In the present case, all Defendants are agents or employees of a single government entity, Chino Valley Independent Fire Department.[1] Although Plaintiff has sued Defendants in their individual and official capacities, Plaintiff has not shown Defendants acted outside their official capacities. Agents of a governmental agency, acting in their official capacities, cannot conspire for the purposes of §1985. *See Hull v. Cuyahoga Valley Joint Vocational Sch.*, 926 F.2d 505, 510 (6th Cir. 1991) ("Since all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy.").

Plaintiff argues that, even when the "intra -corporate conspiracy" doctrine is applied in civil rights cases, it is applied only to a single act of a single entity. Plaintiff argues this rule would not, therefore, apply here because Defendants,

in "numerous acts," "conspired to . . . penalize Plaintiff and his exercise of his rights to seek redress in the federal courts." Complaint ¶132. The "intra corporate conspiracy" doctrine applies when the defendants are agents of one entity regardless of the number of acts. *See Travis v. Gary Community Mental Health Ctr.. Inc.*, 921 F.2d 108, 111 (7th Cir.1990) ("§1985 depends on multiple actors, not on multiple acts of discrimination or retaliation.") .

Plaintiff has failed to establish the conspiracy element of his §1985 claim.

B. Meaning of "Attend"

The Ninth Circuit has not addressed, in a published opinion, the third element of §1985(2) regarding the proper interpretation of "attend". This Court adopts the Fifth Circuit's analysis set forth in *Kimble v. D.J. McDuffy*, Inc., 648 F.2d 340, 347-348 (5th Cir. 1981). The Fifth Circuit held the filing of lawsuits did not constitute "attending" court within the meaning of §1985(2). *See Kimble*, 648 F.2d at 348 ("Congress meant §198S(2) to protect a party's physical presence while attending or testifying in court.") *See also Herrera v. Scully*, 815 F.Supp. 713, 726 (S.D.N.Y.1993)(prison officials, interference with filing of lawsuit by inmate did not violate §1985(2)). Plaintiff has not, therefore, met the third element of §1985(2).

C. "Public Concern"

Even if Plaintiff could meet the elements of §1985(2), Plaintiff would not satisfy the public concern requirement of §1985. Plaintiff argues the public concern requirement applies only to §1983, the Speech Clause, and not to §1985, the Petition Clause. The Ninth Circuit has held to the contrary in *Rendish v. City of Tacoma*, 123 3 F.3d 1216 (9th Cir. 1997) : "We hold that a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the First Amendment." The Court has previously concluded that

Plaintiff's litigation did not meet the public concern requirement. See Order of March 1, 1999 at 2 ("The prior speech against which Plaintiff claims Defendants have retaliated is not public speech which would trigger the protections of the First Amendment.").

D. Disposition

Plaintiff has failed to satisfy the first and third elements of his §1985(2) claim and the "public concern" requirement. Defendant's Motion for Summary Adjudication is GRANTED on Plaintiff's §1985(2) claim.[2]

DATED: August 1999

/s/_____
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

[2]In view of this ruling, the Court does not decide Defendants' qualified immunity contention.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed August 23, 1999]

No.: SA-CV-95-534-GLT (EEx)

FRANKLIN SEXTON,
Plaintiff,

v.

CHINO VALLEY INDEPENDENT
FIRE DISTRICT, et al.
Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Adjudication on the issues of malicious prosecution and abuse of process is GRANTED. The Court need not reach the issue of whether Defendant Grams is entitled to qualified immunity, since the Court has ruled in Defendants, favor on each of Plaintiff's claims.

A. Malicious Prosecution Under § 1983

Plaintiff contends Defendants' institution of worker's compensation proceedings was malicious prosecution under 42 U.S.C. § 1983. The tort of malicious prosecution has been extended to afford a remedy for malicious prosecution of civil

proceedings before an administrative body. *See Hardy v. Vial*, 48 Cal.2d 577, 580 (1957).

To succeed on a malicious prosecution claim in California, a plaintiff must show: (1) the prior proceeding was pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice. *Villa v. Cole*, 4 Cal.App.4th 1327, 1335 (1992).

In *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir.1987), the Ninth Circuit noted an additional federal requirement:

> In this circuit, the general rule is that a claim of malicious prosecution is not cognizable under 42 U.S.C. S 1983 if process is available within the state judicial system to provide a remedy. *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir.1985)(en banc); *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir.1981). However, "an exception exists to the general rule when a malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights," *Bretz* 773 F.2d at 1031; *Cline*, 661 F.2d at 112.

(emphasis added).

Plaintiff contends that in *Albright v. Oliver*, 510 U.S. 266 (1994) a "working majority" of the United States Supreme Court held "a civil claim for malicious prosecution arising from a prior criminal prosecution should be addressed under the Fourth Amendment and its probable cause and reasonableness standards." Plaintiff's Supplemental Memo. in Opposition at 5. Plaintiff further states "'If *Albright*'s probable cause analysis does not apply, then there is no more specific constitutional provision governing this type of claim and substantive due process principles then would apply." Id. at 5,

n. 2.

Albright is inapplicable to the case at bar, as it concerns an allegedly malicious prosecution arising from a criminal prosecution, which is not the situation here. Further, the Fourth Amendment analysis in *Albright* is tied to the facts of the case: the Supreme Court found an arrest warrant constituted a "seizure," which made a Fourth Amendment analysis appropriate. *See Albright*, 510 U.S. at 811.

In *Usher*, *Bretz* and *Cline*, the Ninth Circuit states in order to bring a claim for malicious prosecution under § 1983 a plaintiff must, in addition to satisfying the state test for malicious prosecution, show an intent to deny a separate constitutional right. *See Bretz, supra*, 773 F.2d at 1031 ("an exception exists to the general rule when a malicious prosecution is conducted with the intent to . . . subject a person to a denial of constitutional rights").

Plaintiff contends that, if his proposed *Albright* probable cause analysis is inapplicable, substantive due process principles control. Even if this were the case, the Court has already granted summary judgment in Defendant's favor on Plaintiff's substantive due process claim. *See* Order of March 5, 1999 at 6-8. Additionally, the Court has ruled against Plaintiff on his procedural due process claim (*see* Order of April 28, 1997 at 4-7) and his § 1985(2) claim (*see* Order of August 3, 1999). Thus Plaintiff has failed to support his claim for malicious prosecution under § 1983.

Although Plaintiff devotes a great deal of the substance of his opposition papers to the probable cause element of the state analysis, the Court does not reach these arguments. As noted above, in order to support his federal claim of malicious prosecution under § 1983, Plaintiff must show Defendant intended to deprive him of a constitutional right. The Court has already held Defendant did not violate Plaintiff's constitutional rights by filing a claim on behalf of Plaintiff with the worker's compensation system. Since

Plaintiff has failed to satisfy this threshold element of his federal claim, the Court need not address Plaintiff's arguments concerning the elements of malicious prosecution under state law.

B. Abuse of Process

In *Bidna v. Rosen*, 19 Cal. App. 4'h 27, 40 (1993), the California Court of Appeal explained:

> Abuse of process is not just another name for malicious prosecution. Simply filing or maintaining a lawsuit for an improper purpose (such as might support a malicious prosecution cause of action) is not abuse of process. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal.3d 1157, 1169 (1986). Malicious prosecution and abuse of process are distinct. The former concerns a merit less lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place).

In *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 845 (7th Cir. 1978), the Seventh Circuit stated:

> Whether abuse of legal process or malicious prosecution rises to the level of a constitutional violation actionable under 42 U.S.C. S 1983 depends upon whether, "acting under color of state law, the defendant has subjected the plaintiff to a deprivation of constitutional magnitude." *Hampton v. Hanrahan*, 600 F.2d at 630. However, "conduct which merely engenders common law tort liability, without infringing on constitutionally protected interests, is not a sufficient basis to support a cause of action under Section 1983." *Beker*

> *Phosphate Corporation v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir.1978). "[T]he common law tort of misuse of legal procedure, without more, does not rise to the level of Constitutional wrong remedied by Section 1983." Id.

The Ninth Circuit has not specifically addressed whether a separate constitutional violation is required in an abuse of process claim brought under 42 U.S.C. § 1983. The Court finds the Seventh Circuit's *Cameo* reasoning persuasive, given the Ninth Circuit's requirement of a constitutional violation for malicious prosecution claims in *Usher*, *Bretz*, and *Cline*.

In his original Memorandum of Points and Authorities in Support of Opposition, Plaintiff acknowledges the "Ninth Circuit rule re [sic] malicious prosecution and abuse of process claims requires further proof that the prosecution is occurring for the purpose of depriving some specific constitutional right . . . . Following *[Albright v.] Oliver*, the Ninth Circuit may still require that intent to deprive some constitutional right, although that is not certain." Opp. at 29. As noted above, *Albright* does not create a sweeping rescission of the requirement of a separate constitutional violation; it merely imposes a Fourth Amendment probable cause analysis upon malicious prosecution claims in cases dealing with seizures of the person. In Plaintiff's Supplemental Opposition, he does not propose any constitutional violations (beyond those already rejected by the Court) which may have provided the motive behind or resulted from the alleged abuse of process. See Supp.

Memorandum of Points and Authorities. at 5-8.[1] Plaintiff's original Memorandum suggested an intent on the part of Defendants to deprive Plaintiff of his substantive due process rights, and stated this alleged intent supplied the necessary constitutional element. The Court has ruled against Plaintiff on his substantive due process claim, therefore there is no constitutional violation to support a federal abuse of process claim.

C. Disposition

To bring claims under 42 U.S.C. § 1983 for malicious prosecution and abuse of process, a Plaintiff must demonstrate a violation of a constitutional right in addition to satisfying the state tort requirements. The Court has dismissed Plaintiff's constitutional claims for procedural and substantive due process violations and for 1985(2) violation, thus there is no separate constitutional violation to support Plaintiff's § 1983 claims. *Albright v. Oliver* does not eliminate the requirement of a separate constitutional violation in all malicious prosecution cases, as Plaintiff suggests. In addition, the Court finds the Seventh Circuit's reasoning in *Cameo* to be persuasive, because the *Cameo* court's requirement of a constitutional element to support a federal abuse of process claim is analogous to the Ninth Circuit's reasoning in the *Usher* line of cases.

For the foregoing reasons, Defendants' Motion for Summary Adjudication on the issues of malicious prosecution and abuse of process is GRANTED. The Court need not reach the issue of whether or not Defendant Grams is entitled to qualified immunity, since the Court has ruled in Defendants' favor on each of Plaintiff's claims.

DATED: August 23, 1999.

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[1] Plaintiff merely states his argument that the facts support a finding of ulterior motive, i.e. to make Plaintiff "cease his litigations involving CVIFD and/or to accept disability retirement." Supp. Opp. at 5.

/s/_____
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed September 2, 1999]

No.: SA-CV-95-534-GLT (EEx)

FRANKLIN SEXTON,
Plaintiff,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,
RAY O. SHACKLEFORD,
as an individual and in his official capacity as District Fire Chief;
AL GRAMS,
as an individual and in his official capacity as District Fire Chief;
SOUTHERN CALIFORNIA RISK MANAGEMENT ASSOCIATES, INC.,
a California Corporation and public entity insurance carrier,
Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Gary L. Taylor, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED:

Plaintiff shall take nothing, and the entire action shall be dismissed on the merits. Defendants' cross-complaint against the County of San Bernardino is also dismissed. Defendants Chino Valley Independent Fire District, Al Grams, and Southern California Risk Management Associates, Inc., are entitled to recover costs from Plaintiff in the amount of _____ and attorneys' fees in the amount of _____. Attorneys fees to be sought by appropriate motion.

Dated: 08-31-1999

/s/_____

JUDGE GARY L. TAYLOR

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 22, 2001]

No. 99-56825/No.: SA-CV-95-00534-GLT

FRANKLIN SEXTON,
Plaintiff-Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,
RAY O. SHACKLEFORD,
as an individual and in his official capacity as District Fire Chief;
AL GRAMS,
as an individual and in his official capacity as District Fire Chief;
SOUTHERN CALIFORNIA RISK MANAGEMENT ASSOCIATES, INC.,
a California Corporation and public entity insurance carrier,
Defendants-Appellees.

ORDER

BEFORE: TROTT, THOMAS and BERZON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1985(2):

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

42 U.S.C. § 1985(3):

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the

premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

California Labor Code § 4850:

(a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or the Los Angeles City Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter

3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code), is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(b) The persons eligible under subdivision (a) include all of the following:

(1) City and police officers.

(2) City, county, or district firefighters.

(3) Sheriffs.

(4) Officers or employees of any sheriff's offices.

(5) Inspectors, investigators, detectives, or personnel with comparable titles in any district attorney's office.

(6) County probation officers, group counselors, or juvenile services officers.

(7) Officers or employees of a probation office.

(8) Peace officers under Section 830.31 of the Penal Code employed on a regular, full-time basis by a county of the first class.

(9) Lifeguards employed year round on a regular, full-time basis by a county of the first class.

(10) Airport law enforcement officers under subdivision (d) of Section 830.33 of the Penal Code.

(11) Harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of Section 830.1 or subdivision (b) of Section 830.33 of the Penal Code.

(12) Police officers of the Los Angeles Unified School District.

(c) This section shall apply only to persons listed in subdivision (b) who meet the requirements of subdivision (a) and does not include any of the following:

(1) Employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service.

(2) Employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(3) Employees of a county probation office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(4) Employees of a city fire department, county fire department, or fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service.

(d) If the employer is insured, the payments which, except for this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

(e) No leave of absence taken pursuant to this section by a peace officer, as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, shall be deemed to constitute family care and medical leave, as defined in Section 12945.2 of the Government Code, or to reduce the time authorized for family care and medical leave by Section 12945.2 of the Government Code.

California Labor Code§ 4850.3:

A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement System, may make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance. The payments shall be no less than 50 percent of the estimated highest average annual compensation earnable by the local safety officer during the three consecutive years of employment immediately preceding the effective date of his or her disability retirement, unless the local safety officer chooses an optional settlement in the permanent disability retirement application process which would reduce the pension allowance below 50 percent. In the case where the local safety officer's choice lowers the disability pension allowance below 50 percent of

average annual compensation as calculated, the advanced pension payments shall be set at an amount equal to the disability pension allowance. If a local agency has an adopted policy of paying for any accumulated sick leave after the safety officer is eligible for a disability allowance, the advanced disability pension payments under this section may only be made when the local safety officer has exhausted all sick leave payments. Advanced disability pension payments shall not be considered a salary under this or any other provision of law. All advanced disability pension payments made by a local agency with membership in the Public Employees' Retirement System shall be reimbursed by the Public Employees' Retirement System pursuant to Section 21293.1 of the Government Code.